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No. 594

In the Supreme Court of the United States

OCTOBER TERM, 1960

IN THE MATTER OF THE APPLICATION OF ROBERT BOLAND BROOKS FOR ADMISSION TO PRACTICE LAW IN THE STATE OF WASHINGTON

ROBERT BOLAND BROOKS, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Robert Boland Brooks, through his undersigned counsel, hereby petitions for the issuance of a writ of certiorari to review the ruling of the Supreme Court of Washington denying his application for permission to take the bar examination leading to admission to the practice of law in the State of Washington.

OPINIONS BELOW

The opinions of the Supreme Court of Washington are reported beginning at 156 Wash. Dec. 773, 355 P.(2d) 840, and are set forth in Appendix A, *infra*, pp. 33-51.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), since rights, privileges or immunities specially set up or claimed under the Consti-

tution of the United States have been denied by the court below.

The opinions of the Supreme Court of Washington, which heard the matter *en banc*, were dated and filed on September 29, 1960. No formal judgment has been or will be entered.

QUESTIONS PRESENTED

Where a conscientious objector who was convicted in 1944 for violation of the Selective Service Act in refusing, on religious grounds, to report for work of national importance seeks admission to the practice of law and testifies that he still holds the same religious views today:

(1) Is there any rational basis—as required by the Due Process and Equal Protection clauses of the Fourteenth Amendment — for a State's holding that although "he has otherwise complied with all of the requirements necessary to entitle him to take the bar examination as a general applicant," he is disqualified because, on the basis solely of such violation of the Selective Service Act (a crime of conscience not involving moral turpitude), he is found to be a person who is not of good moral character?

(2) Is a determination as to his moral fitness for the practice of law on the basis of:

(a) an undefined standard of citizenship, or

(b) "personal value emphasis and judgment," or

(c) a finding that his violation of the Selective Service Act demonstrates "traits of character which

> do not have to be approved and countenanced by the members of the legal profession"

so arbitrary and discriminatory as to violate the Due Process and Equal Protection clauses of the Fourteenth Amendment?

(3) Is his duty to the State so paramount to his duty to God that, notwithstanding the protection granted to religious liberty by the First Amendment, as made applicable to the States by the Fourteenth Amendment, a State may disqualify him for admission to the Bar by reason of conduct and beliefs dictated by religious training and conviction?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States here involved are as follows:

Amendment XIV, Section 1:

> " . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . "

STATEMENT OF THE CASE

Petitioner has been denied admission to the bar by the Court below solely on the grounds that he was convicted during World War II of a draft offense committed in obedience to the command of conscience and

that he still holds the religious beliefs which dictated the conduct for which he was imprisoned.

Petitioner was admitted to the practice of law in the State of New York in 1934 and practiced continuously in New York City until 1943.

During World War II, his draft board classified him IV-E, that is, a conscientious objector opposed to both combatant and non-combatant military service. On May 22, 1944, Petitioner was convicted of violation of the Selective Training and Service Act of 1940 (Title 50, App. Sec. 311, United States Code) and sentenced to a term of three years. His violation consisted of a refusal to comply with an order to report for transportation to a civilian public service camp at Mancos, Colorado. His objections to war and conscription were and are based on religious and moral grounds and were a matter of public record as early as 1925. At the time of his conviction, he had for several years been attending meetings for worship of the Religious Society of Friends (Quakers) and he has since become, and is now, a member of the Society.

Prior to his conviction, Petitioner had served on the staff of the National Service Board for Religious Objectors and as Director of the National Committee for Conscientious Objectors in Washington, D.C., during the years 1941 to 1943.

Through counsel Petitioner raised certain constitutional issues by demurrer to the indictment and plea in abatement which were denied in a reported opinion, *United States v. Brooks* (DC, SD, NY—1944) 54 F.

Supp. 955. He then waived jury trial, stipulated with the government as to the facts, and was convicted as stated above. The Circuit Court of Appeals for the Second Circuit affirmed the conviction, *Brooks v. United States* (CCA 2—1945) 147 F.(2d) 134. The Supreme Court denied certiorari on April 23, 1945, *Brooks v. United States*, 324 U.S. 878, 89 L.Ed. 1430, 65 S.Ct. 1027. The transcript of Mr. Brooks' trial and all the briefs in connection with his appeal will be found in the Record in a folder designated page 105.[1]

The Grievance Committee of the Bar Association of the City of New York considered his conviction and took no action against him (R. 17). A certificate of the Appellate Division, First Department of the Supreme Court of New York certifies that he is presently a member in good standing of the New York bar (R. 16).

On October 27, 1958, Petitioner filed with the Washington State Bar Association his Application for Registration for the Bar Examination and paid the required fees (R. 4-14).

Under date of June 26, 1959, the Board issued its Findings of Fact and Order Denying Application with respect to Petitioner. It stated therein that if Petitioner be found to be a man of good moral character, then "he has otherwise complied with all of the requirements necessary to entitle him to take the bar examination as a general applicant." It proceeded to

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[1] The transcript of the record certified by the clerk of the Court below is hereinafter referred to as "the Record" or designated "R."

find, however, that he is not a man of good moral character in that he had been convicted of willful violation of the Selective Training and Service Act of 1940, which the Board found to be a crime involving moral turpitude, without either explaining this result or citing authority therefor.

Upon receipt of a copy of the Board's findings and order, Petitioner instituted an original proceeding in the Supreme Court of Washington seeking permission to take the bar examination. The case was argued to the court sitting *en banc* on October 19, 1959. As indicated above, the opinions of the court were filed on September 29, 1960. This petition seeks review of the decision of the Supreme Court of Washington rather than the action of the Board of Governors.

Petitioner first raised the federal constitutional grounds here relied on in a memorandum brief filed with the Board of Governors of the Washington State Bar Association on February 12, 1959, when that body was reconsidering Petitioner's application for registration for the bar examination. The pertinent portion of the brief, in extract form, is set forth in the Record at pp. 22-27. Thereafter, in support of the application made to the Supreme Court of Washington, a brief was filed with that Court in which the federal constitutional rights here sought to be protected were again set forth (R. 222-232). The Court below recognized that the federal constitutional issues had been properly raised (Appendix A, *infra*, p. 43).

The principal opinion below rejected Petitioner's claims of rights, privileges or immunities under the

Constitution of the United States by ignoring his contentions altogether and disposing of the matter without reference to the constitutional issues (Appendix A, *infra*, pp. 33-36). The concurring opinion conceded that qualifications for admission to the bar must, under the decisions of this Court, bear some rational connection to the applicant's fitness for the practice of law, but concluded that under that test Petitioner's traits of character disqualify him (Appendix A, *infra*, pp. 40 and 43). The dissenting opinion concludes as follows (Appendix A, *infra*, at p. 51):

> "I am challenged, in a day when the trend is to sacrifice principle to expediency, by one who preferred to go to jail rather than do what his conscience said he should not do. In any event, I can find no moral turpitude here, and no lack of moral character.
>
> "Finally, there is no rational connection between the claimed disqualifying acts and the applicant's fitness to practice law. *Schware v. Board of Bar Examiners of New Mexico* (1957), 353 U.S. 232, 1 L.Ed. (2d) 796, 77 S.Ct. 752, 64 A.L.R. (2d) 288, quoted in *In re Flynn* (1958), 52 Wn. (2d) 589, 328 P. (2d) 150.

REASONS FOR GRANTING THE WRIT

A. Summary Statement of Reasons.

The Court below has refused to follow the rules laid down in *Schware v. Board of Bar Examiners* (1957) 353 U.S. 232, 1 L.Ed.(2d) 796, 77 S.Ct. 752, and *Konigsberg v. State Bar of California* (1957) 353 U.S. 252, 1 L.Ed.(2d) 810, 77 S.Ct. 722. This is the first of the cases concerning the constitutional protection afforded

to applicants for admission to the bar which involves the question of conscientious objection to war and its bearing upon moral fitness to practice law. This Court has recently granted certiorari in two bar admission cases, *Konigsberg v. State Bar of California* (1960) 362 U.S. 910, 4 L.Ed.(2d) 618, 80 S.Ct. 611, and *Re Anastaplo* (1960) 362 U.S. 968, 4 L.Ed.(2d) 900, 80 S.Ct. 955. We believe that this case complements these two—and that it involves a more far-reaching question than either of them, because the number of conscientious objectors who will be affected if the decision below is permitted to stand is substantially greater than the number of individuals likely to refuse flatly to respond to inquiries into political beliefs and associations. During the period from October, 1940 to June, 1945, 5,516 conscientious objectors were convicted of draft offenses. Sibley and Jacob, *Conscription of Conscience* (1952) p. 348. This would indicate that in any given five-year period there are now, and in the near future will be, in excess of 5,000 men of military age and not otherwise exempt, whose conscience will not permit them to accept the forms of alternative service which were available during World War II. All these would be disqualified for licensed callings requiring good moral character by the ruling of the Court below. In addition, 11,996[2] conscientious objectors went to

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[2]It should be noted that some 42% of these were *not* members of the historic peace churches (The Quakers, Mennonites and Brethren). Sibley & Jacob, *op cit*, p. 168. Furthermore, it is generally recognized that a high percentage of conscientious objectors are professionally or technically trained. Sibley and Jacob report that of those under Quaker sponsorship in World War II, 60% fell into these categories. (Op. cit. p. 231).

civilian public service camp during World War II, and these too—along with others like them coming of military age each year—would seem debarred from these same pursuits because the Court below requires a "sense of duty" seemingly so related to a war effort as to violate the consciences of these men as well. And, if the implications of the principal opinion[3] below are then extended to men of all ages who share Petitioner's "felonious principles" it must be apparent that several thousand sincere and worthy citizens would be involved if the result below is allowed to stand as within the scope of permissible State action.

Furthermore, the Washington Court has reached a result which is sharply at variance with the administrative practice and judicial decisions of other states. The United States Supreme Court and the courts of California, Massachusetts, Missouri, New York, Pennsylvania, and the District of Columbia, have admitted to practice men previously convicted of offenses comparable to that of petitioner—and have done so administratively, without litigating the question (R. 266-273, 400-423). North Carolina has similarly permitted a man convicted for such an offense to take the bar examination (R. 419). And although the volume of judicial precedent in this field is comparatively small,

[3]The Court below divided 6 to 3. The position of the majority is stated in two opinions. One, hereinafter referred to as the principal opinion, was signed by only two judges. Another judge concurred in the result, setting forth his views in a separate concurring opinion. Three judges simply concurred in the result reached in the principal opinion, but without indicating their reasons. The dissent is signed by two judges and its result concurred in by a third.

the cases generally hold that a conviction for violation of the Selective Service Act is not, in and of itself, evidence of bad character.

Even a casual reading of the majority opinions below makes clear, we believe, that the court's denial of petitioner's application for permission to take the bar examination was arbitrary and capricious and that it failed to adduce either reason or precedent in support of its conclusion. Both opinions studiously avoid any reference to the standard generally applied in cases where the character of one previously convicted of a crime is in question, namely, whether his offense was one involving moral turpitude. The case was presented to the court in these terms and authorities were cited clearly establishing that Mr. Brooks' offense was *not* in this category. Instead, the principal opinion seems to reject Mr. Brooks for failure to meet some undefined "standard of citizenship" having no basis in the rules and cases relating to admission to the bar. Similarly, the concurring justice finds Petitioner to be disqualified because he has "demonstrated traits of character which do not have to be approved and countenanced by the members of the legal profession," although this suggests a standard equally without foundation in the law of Washington or any other jurisdiction.

These alleged standards are so vague as to permit arbitrary action, and the concurring opinion flatly claims a right to exercise discretionary power in this critical area, asserting that the decisional process in a case like this is "simply a matter of value emphasis and personal judgment." Like the purported standard of

citizenship, this kind of a test for admission to the bar would subject all applicants to the danger of arbitrary discrimination by reason of all kinds of conduct which might be deemed by the court to demonstrate undesirable traits of character—especially since the court below apparently does not feel that it is required to explain its results, relate the conduct in question to moral character in terms of general experience, or show any relevant connection between the character trait involved and the qualifications of an attorney.

We submit that for these reasons, which are amplified below, this Court should grant the writ of certiorari requested hereby. The Court should review this case not only because it was wrongly decided below, but also because it involves a question of broad importance to members of the historic peace churches, to communicants of other faiths who are conscientiously opposed to war and conscription, and to the public which has an interest in the standards for admission to the practice of law which overrides the interests of the individual applicant or the organized bar itself. What is said in the principal decision below would seem to exclude from the legal profession—and presumably from the fields of medicine, dentistry, accountancy and all other callings for which good moral character is a prerequisite—all persons holding religious convictions against war and conscription, whether or not they have ever been impelled thereby to violate the law. We believe this Court should take judicial notice that many conscientious objectors, including men convicted of com-

parable offenses, have been admitted to the practice of medicine and other professions.

B. The Record Does Not Indicate, nor Do the Opinions Below State, Any Rational Basis for the Conclusion That Petitioner Is Not Morally Qualified to Practice Law.

The constitutional limitations imposed upon state action with regard to regulation of admission to the practice of law are stated in *Schware v. Board of Bar Examiners, supra,* at 353 U.S. 238 to 239, as follows:

> "A State cannot exclude a person from the practime of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.[5] (citing cases) A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

[5] We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. Ex parte Garland (US) 4 Wall. 333, 379, 18 L.Ed. 366, 370. [This is the Court's footnote.]

This same rule is stated in *Konigsberg v. State Bar of California, supra,* at 353 U.S. 262, 273. We wish to make clear at the outset that there is, in this case, no question of state procedure and no issue of refusal to answer inquiries of the admitting authorities such as led to the dissents in the latter case.

The constitutional issues posed by the decision of the court below are presented quite directly. As is indicated in the principal opinion, the Board of Governors of the Washington State Bar Association had made a finding that Petitioner had compiled with all the requirements necessary to entitle him to take the bar examination save and except for the fact that it further found him not to be of good moral character. A majority of the court below reached the same conclusion as to Petitioner's character, and did so on only two grounds:

(1) That he had been convicted in 1944 of a felony—i.e., a violation of the Selective Service Act consisting of refusal to report for transportation to a civilian public service camp for alleged work of national importance—and that his action in so refusing was unjustifiably defiant of the laws of the United States; and

(2) That there has been no substantial change in his principles.

The sincerity of the religious training and beliefs which led Petitioner to refuse to report to the government camp is not questioned by the court. There is no suggestion in either of the majority opinions that there was any doubt as to Petitioner's sincerity—in fact, the concurring opinion expressly recognizes his good faith (*infra*, p. 38). The entire record makes clear that at all relevant times Mr. Brooks was a conscientious objector to war, to conscription, and to compulsory labor in the civilian camps in use during World War II, and that his draft board recognized his status as such. How-

ever, the majority of the Court below concluded that notwithstanding his sincere religious motivation, petitioner's conviction and his continued adherence to his principles render him morally unfit to practice law.

Thus the issue here is essentially the same as it was in the *Schware* case: Does the matter relied upon by the Supreme Court of Washington as disqualifying Petitioner for admission to the bar "have a rational connection with the applicant's fitness or capacity to practice law" and is the record such that the court "could reasonably find that [Petitioner] had not shown good moral character?" (*Schware*, 353 U.S. at 239)

The meaning of the "rational connection" test as stated in *Tot v. United States* (1943), 319 U.S. 463, at 464-8, 87 L.Ed. 1519, 63 S.Ct. 1241, is that there must be a connection "in common experience" and that the inference sought to be drawn must have "a reasonable relation to the circumstances of life as we know them." Translating this to the circumstances of this case, the question becomes: In the circumstances of life as we know them, are Quakers and others holding religious objections to war known to be lacking in good moral character? What connection is there, in common experience, between the conviction of a conscientious objector for a draft offense and the qualifications which are required in a lawyer which could be urged as sustaining a conclusion that a person thus convicted lacks the honesty, integrity, diligence, courtesy and other traits of moral character which make a man worthy of trust by the courts and the public? The answer is that the principal opinion neither asks nor answers this

question, but instead completely ignores the constitutional issue which was presented to the court. The concurring opinion at least recognizes that there is an issue, but fails to translate it into understandable terms or to explain how the result it reaches complies with the constitutional requirements. We submit that there is nothing in either of the majority opinions which demonstrates, by analysis, definition, or citation of precedent, any logical basis for the conclusion that Petitioner's conduct and beliefs are, in terms of common experience relevant to qualifications for the bar, evidence of lack of good moral character.

The proper answer to the above questions should be, we submit, in accordance with the following statement from Cornell, *The Conscientious Objector and the Law* (1943) at page 113:

> "There is only one question involved here, and that is whether a conscientious objector is a man of good character, who can properly exercise the public trust reposed in a lawyer. To this question there can be but one answer: conscientious objectors are not only men of good character, but demonstrate their willingness to make personal and economic sacrifices as well as to suffer criticism for the sake of moral principles. Such men are unusually well endowed with the moral strength which is needed in a lawyer. The opposite conclusion could only be reached by ignoring the sincerity of a conscientious objector and treating him like the draft evader or 'slacker.'
>
> "History lends support to the proposition that conscientious objectors are qualified to practice law. Not only have many pacifists been lawyers,

> some of them prominent, but pacifists generally have enjoyed public confidence for their honesty and moral character. The best known of pacifist groups, the Quakers, have a reputation for honesty and have held many positions of public trust, especially in Pennsylvania."

A study of the cases dealing with the standard of good character here involved clearly shows that when an individual has been convicted of a crime, the issue is whether his offense was one involving moral turpiture. If it is concluded that his offense, though a statutory crime, was not one touched with moral turpitude, then his ability to establish the good moral character required for admission to the bar is not impaired.

The test of moral turpitude is spelled out in the Washington Rules for Discipline of Attorneys, Rule 10(1), 34-A Wn.(2d) 183, as follows:

> "An attorney or counselor may be reprimanded, suspended or disbarred for any of the following causes:
>
> "(1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence.
>
> * * *"

The Washington Supreme Court has consistently applied this test in determining questions as to the character qualifications required of attorneys. For a recent case, see *In re Molthan* (1958) 52 Wn.(2d) 560, 327 P.(2d) 427.

This issue was directly presented to the Board of Governors and to the court below. The Board found

that Petitioner's offense in 1944 was one involving moral turpitude, but neither of the majority opinions of the court ratifies this finding or makes a similar one of its own. In fact neither opinion even refers to the concept of moral turpitude. We submit that the most logical explanation for this is that the majority recognized that under the authorities cited to it Petitioner's offense was clearly not to be classified as involving moral turpitude. If this were not the case, it would have been a simple matter for the majority justices to find moral turpitude and dispose of the case in the normal way. Their failure to do so cannot be overlooked![4]

The authorities on the issue of moral turpitude were extensively cited to the court below (R. 198-226). These make it clear that to affect character, something more than commission of a statutory crime must be shown —it must be established that the conduct in question involved the additional ingredient, moral turpitude.

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[4]This failure cannot be obviated by the principal opinion's holding that the Board's ruling was not arbitrary or capricious. The dissent points out that the court can, under its decisions, arrive at a different conclusion on the same record without thus characterizing the Board's action. More fundamentally, it must be noted that although the Board made a finding of moral turpitude, it likewise offered no explanation and cited no authority in support of its bare conclusion (R. 141). Nor is this omission supplied by the principal opinion's passing references to what it labels as Petitioner's "defect of character" and his "felonious principles" (*infra*, p. 35). The former is never defined in moral terms and, as used in the opinion, distorts our argument, which was that his conviction of a crime of conscience never at any time evidenced lack of good character. The latter phrase can refer only to Petitioner's continued religious objection to war. We submit that only acts can be termed felonious, and that to characterize religious beliefs in this way violates the spirit of *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, 642, 87 L.Ed. 1628, 63 S.Ct. 1178. Cf. Footnote 30 in the first *Konigsberg* case, 353 U.S. at 270, and cases there cited.

But these authorities go further and make it clear that moral turpitude means baseness, vileness or depravity; that it characterizes the gravest offenses which are inherently immoral; that fraud is ordinarily the test, or wrongdoing for personal gain; and that when an attorney's membership in the bar is at issue, the question is whether the offense reflects bad character with respect to his profession. See the first *Konigsberg* case, *supra*, at 353 U.S. 262-263. If any of these tests is applied it is clear that the offense for which Mr. Brooks was convicted was *not* one involving moral turpitude. This seems to be conceded by the majority's abandonment of this entire concept.

Instead the majority attempts to suggest new standards, but without citing any authority for them or offering any explanation as to how they satisfy the "rational connection" test of *Schware* and *Konigsberg*. The principal opinion tries to equate an undefined "standard of citizenship" with the requirement of "good moral character" actually specified in the Rules for Admission. No justification or explanation is offered for this substitution of a different test having no foundation in the rules. Though the concept of moral character is somewhat vague, there is a substantial body of case law which has given meaning to this standard. But the proposed "standard of citizenship" is even more imprecise, and involves the court in an area where there is danger that qualification for the bar will be judged in terms of the political, economic, social, and religious views of the judges. This would constitute a serious threat to our traditional concepts of

freedom of thought and association which are protected by the First and Fourteenth Amendments.

What has been said with regard to this "standard of citizenship" applies equally to the statement in the concurring opinion that Mr. Brooks has demonstrated traits of character "which do not have to be approved and countenanced by the members of the legal profession of our state." If the offense for which Petitioner was convicted was one involving moral turpitude, this should be stated, with citation of supporting authority. If it was not, as we believe is clear, then we submit that whether the present members of the legal profession do or do not "approve" of the conduct or beliefs of applicants for admission to the profession is irrelevant to any constitutionally valid standard for such admission. Such a standard is completely arbitrary, is by its nature incapable of proof, and cannot be shown to have any rational connection with the necessary qualifications and capacity for the practice of law. Certainly the concurring opinion below offers neither logic nor authority to support its flat assertion that there is such a rational connection.

It is conceded, of course, that Mr. Brooks committed a statutory crime and was punished accordingly. But his offense involves a paradox, since it required as an essential element the possession of moral and religious convictions of such a compelling nature as to dictate conduct known to involve serious consequences. The conflict which occasionally occurs between conscience and the law was referred to by the dissenting judge, who cited Chief Justice Hughes' dissenting opinion in

United States v. Macintosh (1931) 283 U.S. 605, at 633, 75 L.Ed. 1302, 51 S.Ct. 570:

> "When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."

See, also, *United States v. Kauten* (CCA 2—1943) 133 F.(2d) 703, at 708.

In the specific area of draft offenses, we have discovered no case in the United States in which a man found to qualify as a conscientious objector has been denied admission to the bar, or has been disbarred, for violation of the Selective Service Act by refusing to go to camp.

The New York courts do not regard the holding of conscientious objections to military service or the conviction of a draft violation as necessarily establishing bad moral character. *Application of Steinbugler* (1947) 297 N.Y. 713, 77 N.E.(2d) 16.

In *Koster v. Holtz* (1938) 3 N.Y.(2d) 639, 171 N.Y.S. (2d) 65, an applicant for an insurance broker's license had been convicted of a violation of the Selective Service Act after having been refused classification as a conscientious objector. The Superintendent of Insurance refused to go behind his conviction in determining

whether he met the requirement of being "a competent and trustworthy person" and denied his application. The Court of Appeals reversed, stating that classification as a conscientious objector might have been denied (1) because of insincerity, or (2) because the applicant did not fall within the statutory definition of a conscientious objector, as where his stand is taken on essentially political rather than religious grounds. The court held that if he came within the second category he was not untrustworthy within the meaning of the statute because, as it stated at 171 N.Y.S.(2d) 72:

> "In applying permissible standards there must be a rational basis for the Superintendent's findings. [Citing *Schware v. Board of Bar Examiners, supra*] . . . it (the statute) does not allow the conviction for *any* or *every* crime to be alone sufficient ground for a finding of untrustworthiness."[5]

Similarly, California does not regard conviction for draft violation as disqualifying an applicant for a professional license where good moral character is a prerequisite. *Clark v. State Board of Education*, R. 262-265.

A more extensive record of admission of conscientious objectors to the legal profession has been accomplished in these and other states through administrative action and without adjudication. These cases, which are referred to above, can be summarized as follows:

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[5] New York disbarred one attorney for a conviction for failing to report for induction, but apparently found this action to have been based on misconstruction of its statute and later reinstated him. *In re Greenberger* (1942) 265 App. Div. 343, 38 N.Y.S.(2d) 758; *In re Greenberger* (1951) 105 N.Y.S.(2d) 903.

Name	*Offense*	*Where Admitted*	*Pages in Record*
Richard W. Petherbridge	Refusal to report for induction	California	266-272
Oliver E. Stone	Refusal to report for induction	Massachusetts District of Columbia (including U.S. Court of Appeals and the Supreme Court of the United States)	400-413
Norman Wood	Refusal to report for induction	Missouri	414
Joseph Felmet	Refusal to report for induction (twice) plus offenses in connection with work with Negroes	Not admitted but twice permitted to take examination in North Carolina	419
Olin Harper LeCompte	Refusal to complete questionnaire (later conviction for refusal to work in camp reversed)	New York	414a-416
Albon P. Man, Jr.	Refusal to report for induction	New York	417-418
Clyde W. Summers	No conviction — advised court he would violate law in certain circumstances	New York	420-423
Caleb Foote	Refusal to report to civilian public service camp	Pennsylvania	273

Against this list of judicial and administrative decisions granting admission to the bar to conscientious objectors, including those convicted of offenses comparable to that of Petitioner, stands a single case which reaches a contrary result, *In re Pontarelli* (1946) 393 Ill. 310, 66 N.E.(2d) 83. However, that case is distinguishable because Pontarelli's claim as a conscientious objector had been rejected by the draft authorities, the Illinois court refused to look behind his conviction, and there was thus an unresolved question as to whether he was a *bona fide* conscientious objector—an issue not present here. Furthermore, the *Pontarelli* case is strongly criticized by the Board of Immigration Appeals in *Matter of S* (1953) 5 I. & N. Dec. 425, which is interesting in itself, holding that an alien's conviction for refusing to report for non-combatant service was not one involving moral turpitude or one making him subject to deportation.

We have dwelt thus far upon the failure of the majority below to demonstrate any rational connection between the fact of Petitioner's draft conviction and the conclusion that he is not morally fit to practice law. However, it must be noted that as a part of his affirmative case the Petitioner has fully satisfied any rational burden of proof by offering evidence clearly establishing his good moral character.

Petitioner submitted to the Board of Governors forty-one letters from friends and acquaintances who have known him during his residence in the State of Washington. The writers of these letters include leaders of the Society of Friends, lawyers, journalists, uni-

versity professors, ministers, business men, and others. All of these people attest, without qualification, to Mr. Brooks' good moral character. In fact, they state with remarkable uniformity that he is a man of superior character.

We submit that these letters (R. 28-77) constitute a substantial showing of good character and a remarkable tribute to a man who came to the State of Washington some fourteen years ago and has made a real contribution to his community. It will be apparent that the writers of these letters have known Petitioner intimately and in most cases for long periods of time. One could hardly ask for a stronger demonstration of uniformly high regard and respect on the part of people who, though unknown to this court, are responsible and respected citizens of the community, and known to be such by the Board and the court below. Among the letters are some twelve from attorneys, one of whom is now a superior court judge. It must surely be recognized that these are not opinions which should be summarily dismissed.

On the record in this matter, therefore, no one has "testified" against Mr. Brooks' moral character, while a substantial number of responsible and representative citizens of the community have expressed high regard for him as a man of character. The *only* item thrown in the scales against this affirmative showing of good character, and against Mr. Brooks' legal career in New York, is his conviction for violation of the Selective Service Act. In the absence of any demonstration that this was a crime involving moral turpitude or

that it indicates that Petitioner, if he can pass the bar examination, would not serve his clients well and fully discharge his duties to the courts, the record clearly establishes that he is a man of good moral character. Conversely, this means that there can be found in the record no rational basis for the Court's action in holding Petitioner to be morally disqualified for the practice of law. The Washington Supreme Court has therefore clearly failed to meet the test laid down by this Court in the *Schware* and *Konigsberg* cases.

C. All of the Alternative Tests Suggested by the Majority Below Are Arbitrary and Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

As has been pointed out above, the various tests suggested by the majority below in lieu of the standard of moral turpitude specified in the Court's own rules fail to meet the "rational connection" test of the *Schware* and *Konigsberg* cases. But beyond that they are subject to further constitutional objection because they are inherently arbitrary and leave admission to the bar at the mercy of the Court's unfettered discretion.

The concurring opinion below states that the issue in this case cannot be resolved "by reference to absolute or objective standards," and that the decisional function here is "purely and simply a matter of value emphasis and personal judgment" (*infra*, p. 38). At a later point, the opinion suggests that if this Court reviews the case, this would be "nothing more than a substitution of personal value emphasis and judgment by a majority of the members of the United States Supreme

Court for the personal value emphasis and judgment of the majority of the members of our own State Supreme Court" (*infra*, p. 43). Of course, these statements appear in an opinion signed by but a single justice. However, he seems to be undertaking to describe the process by which the majority reached its result, in which he concurred, and there is certainly nothing in the principal opinion to suggest that any valid standards were involved in deciding the case.

The view expressed by the concurring opinion is, essentially, a call for unlimited discretion in deciding who shall, and who shall not, be admitted to the practice of the law. To subject those seeking admission, or those who have been admitted but may be subjected to discipline, to such an arbitrary exercise of power, with all the possibilities of discriminatory action which lack of standards permits, would clearly be to deprive the individuals concerned of liberty and property without due process of law and to deny them the equal protection of the law.

This conception seems to mean that the court need not explain its results in understandable terms to the individuals concerned, since it assumes that there are no objective standards which it must respect. Certainly, the two opinions of the majority below do little more in this connection than to state the end result of their deliberations, namely, that petitioner is, for some reason never really explained, not of good moral character. At the same time, this theory implies that this Court cannot review the result below in any meaningful way because no standards were used, and therefore no

evaluation of the result can be made. This would result in untrammeled power of a sort thoroughly repugnant to our system of government.

The principal opinion and the concurring opinion both seek to make Petitioner's present attitude toward war a ground for the result reached. Yet it is perfectly clear that a man possessing the same views—but who has not yet come into conflict with the law, because never called upon to serve under the conditions prevailing in the civilian public service camps in World War II—can gain admission to the bar without difficulty, simply because he is not asked anything about his views on this subject.

If the principal opinion does not mean to label all conscientious objectors as immoral[6], then Mr. Brooks is denied equal protection when he is excluded from the bar merely because his conscientious opposition to war has led him to violate the Selective Service Act. This is done without any explanation as to why one who acts in accordance with his religious views is less moral than one who holds the same views but is never involved in action which violates the law. It cannot be sound constitutional doctrine that to hold certain religious convictions is moral up to the point where one acts upon them, but not beyond!

The other tests or standards suggested, but never explained or justified, in the majority opinions are equally arbitrary. The "standard of citizenship" advanced

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[6]It should be noted that the broad implications of the opinion's next to last paragraph elicited expressions of concern in both the concurring and dissenting opinions (*infra*, pp. 42, 45, 46.

by the principal opinion seems to mean that anyone who cannot, by reason of his religious principles, promise that he will under all conceivable circumstances discharge his duty to the government in wartime in a manner satisfactory to a majority of the Court must be classified as a bad citizen. This conclusion is then treated as establishing lack of the moral character required for admission to the legal profession and other licensed callings for which good character is a requirement. This would exclude from these fields everyone having conscientious religious objections to war—whether Quakers, Baptists, or Catholics—regardless of whether war ever comes or whether the government ever calls on such individuals for service which they cannot conscientiously give. Such arbitrary treatment of people who by any rational standards are probably better than average citizens, and are certainly of good moral character, deprives them of liberty without due process of law and denies them equal protection of the law.

In like manner, the position of the concurring justice that Petitioner is disqualified because he has "demonstrated traits of character which do not have to be approved and countenanced by the members of the legal profession", is arbitrary and discriminatory. First of all, as argued above, no explanation is given as to what traits of character are involved, how they are deduced from Petitioner's conviction, or what their relationship to the necessary qualifications for the practice of law may be. Furthermore, it is nothing short of startling for the author of this opinion to con-

clude that any adverse inference can be drawn from Petitioner's conduct when he himself expresses the hope that Petitioner's attitude, and the dissent's appraisal of it, may win universal acceptance. Beyond this, however, the basis for action suggested in the concurring opinion is no standard at all, but—consistent with the author's flat statement that decisions in these cases must be made in terms of "value emphasis and personal judgment"—is merely a claim of unfettered discretion in the state courts.

So again we are brought back to the established test which the majority below has so carefully avoided. This test of moral turpitude provides the only standard of moral character which can be fairly and practically applied in determining qualifications for the attorney's office. In the absence of a showing of any element of vileness, fraud, deceit or self-seeking in Petitioner's conduct, none of the tests suggested by the majority below meet the elementary requirements that a man be judged by known standards fairly applied to all.

D. No Emergency or Other Overriding Considerations Having Been Shown, a State Cannot Require the Abandonment of Religious Beliefs as a Condition to Admission to the Legal Profession.

Although the religious liberty of the individual is not entirely free of limitation, such restraints have normally been restricted to emergencies or other situations where individual rights are deemed overbalanced by the interests of the people at large. If we are to preserve our essential liberties, encroachments thereon must be kept to a minimum.

Thus, if Washington seeks to impair Petitioner's religious freedom, it must make a solid showing of conditions which make this result necessary for the protection of substantial interests of its people. It must be conceded that Petitioner's religious liberty *has* been impaired, since it is clear that the result below rested, in part, upon his continued adherence to religious objections to war and conscription which have long been associated with the Quakers. Thus to attach serious disabilities to the espousal of religious beliefs must, in the absence of some overbalancing public interest, be held to violate constitutionally protected religious freedom.

But no such showing has been attempted. It has not been shown that to permit conscientious objectors to practice law in Washington will undercut its judicial system, leave the public prey to incompetent or unscrupulous attorneys, or produce other public evils so serious as to justify the imposition of a religious test designed to exclude them. In the absence of such a demonstration of compelling necessity for a contrary policy, men should be permitted to hold whatever religious beliefs they may choose and still gain admission to the practice of law. If at some future time their beliefs lead them to conduct which the nation feels should be punished because of the existence of a national emergency —as was true with respect to Petitioner's actions in 1944—it may be that such limitations will be held to be constitutionally permissible. However, even in such circumstances their religious beliefs, and conduct motivated thereby, could not be made the basis for exclusion from the legal profession without a showing that such

a further restraint upon the liberties protected by the First and Fourteenth Amendments was necessary to protect some overriding public interest which would be rationally served thereby. Conscientious objectors have gone to prison for their beliefs in the past and may perhaps do so again in the future, but as the dissenting opinion below points out, there is nothing in that fact to establish such a lack of good moral character as to disqualify such men for the practice of law.

The freedom of religion guaranteed by the First and Fourteenth Amendments should be unfettered except for those situations—fortunately comparatively few—where overriding public considerations require the imposition of some restraints. However, there is no necessity established in the record here for interfering with the individual's religious convictions by establishing a test of religious conformity for admission to the bar.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this petition be granted and a writ of certiorari issued to review the decision of the Court below.

Respectfully submitted,

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APPENDIX A

[156 Washington Decisions 773]

WASHINGTON SUPREME COURT OPINIONS

[No. C. D. 4972. *En Banc*. September 29, 1960.]

In the Matter of the Application of ROBERT BOLAND BROOKS *for Admission to Practice Law in the State of Washington*

MALLERY, J.—This is an application in this court for permission to take the bar examination. The application recites that the board of governors has denied his previous application upon the ground that he was "not a man of good moral character."

The applicant has been a resident of this state since 1946. He is a citizen of the United States and is fifty years of age. In 1933, he graduated from Columbia University Law school, which is approved by the American bar association. He was admitted to practice law in the state of New York in 1934.

The finding that the applicant is "not a man of good moral character" is predicated upon his conviction of a felony for which he served approximately twenty-two months of a three-year sentence in a Federal penitentiary. The facts in his case are stated in *Brooks v. United States*, 147 F.(2d) 134, as follows:

"The appellant, a citizen residing within the Southern District of New York, whose age made him subject to classification under the provisions of the Selective Training and Service Act of 1940, duly registered with his local board and, having established his status to be that of a conscientious objector under § 5(g) 50 U.S.

C.A. Appendix § 305(g), was classified as IV-E. He was examined as to his mental and physical fitness and, having been found fit, was ordered to report, for transportation to Civilian Public Service Camp No. 111 at Mancos, Colo. He then refused to report for that purpose and so notified his local board. Having persisted in such refusal, he was indicted, tried, convicted, and sentenced under § 311 of the Appendix to Title 50 U.S.C.A. and has appealed.

"The constitutional questions now raised are not new and have uniformly been decided adversely to the contentions of the appellant in cases like Weightman v. United States, 1 Cir., 142 F.2d 188, and Heflin v. Sanford, 5 Cir., 142 F.2d 798. The federal government in the exercise of its undoubted power to raise and maintain armed forces for the protection of the country could have disregarded the appellant's conscientious scruples against participating in such service and conscripted him for any military service for which he was mentally and physically fit. United States v. Macintosh, 283 U.S. 605, 622, 623, 51 S. Ct. 570, 75 L. Ed. 1302. Having respected his conscientious objection to all such service, even to the extent of granting him exemption from non-combatant duty, Congress could in the exercise of its incidental power do whatever was reasonably necessary and appropriate to raise and maintain armed forces provided that those who were given exemption from such service be required to perform such work of national importance as they were able to perform under reasonable rules and regulations. There are many good reasons which may have led Congress so to provide but it is enough that such action may have been considered needed during a great national emergency for its effect upon the morale of those who do serve in the armed forces. As was said in United States v. Schwimmer, 279 U.S. 644, 651, 49 S.Ct. 448, 450, 73 L.Ed. 889, 'The in-

fluence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms.' See also Kiyshi Hirabayashi v. United States, 320 U. S. 81, 99, 63 S. Ct. 1375, 87 L. Ed. 1774."

The board of governors made the finding:

"That if the applicant, Robert Boland Brooks, be found to be a man of good moral character, he has otherwise complied with all of the requirements necessary to entitle him to take the bar examination as a general applicant."

[1] The act of the board of governors in finding that the applicant is not a man of good moral character, is not arbitrary or capricious. We adopt its finding that "The acts of the applicant . . . were unjustifiably defiant of the laws of the United States."

No one has contended that this court should overrule the board of governors and admit a person to practice *while* he is feloniously refusing noncombatant service in aid of his country's war effort. Instead, the theory presented is that the applicant's defect of character is of a temporary nature and does not survive an elapse of time sufficient to end the war and the national emergency. This temporary defect is considered as having no future implications because the applicant is most unlikely, at his present age, to have another opportunity to set personal example of resistance to the Nation's war efforts. It is therefore considered immaterial that there has been no substantial change in his felonious principles to which he adheres, by his own statements, to this very day.

We are not inclined to adopt a transitory theory as to the applicant's character. Age alone has not reduced his potential for war resistance to zero. Personal example is neither the only nor most effective way of exemplifying his felonious principles. An old lawyer can impede his country's war effort in many ways as well as a young one.

It should go without saying that we are not here concerned with any additional punishment of the applicant for his past felony. He has served his sentence and he is permanently at large. Nevertheless, his character, with his fixed refusal to aid a war effort, is directly and necessarily in question when he seeks admission to practice law.

On the credit side of applicant's character is his laudable preoccupation with civil liberties. Indeed, the rights of individuals, as such, are the very essence of liberty as we know and seek to implement it.

On the debit side of the ledger is his felonious denial of any *duty* related to the enjoyment of these individual liberties. A loyal and discerning citizen is aware of his great heritage of liberty and acknowledges his duty to do his share in preserving it. Without a sense of duty, the applicant does not measure up to the standard of citizenship rightly expected of an attorney at law.

We are not prepared to find that the board of governors acted arbitrarily and capriciously.

The application is denied.

OTT, J., concurs.

WEAVER, C. J., DONWORTH, and HUNTER, JJ., concur in the result.

FINLEY, J. (concurring in the result) — This case poses an old, philosophically debatable, problem. It involves a head-on collision between two diametrically opposite opinions or ideas as to moral values.

The problem may be dramatically illuminated by the following: (1) Is war and the killing of human beings therein moral or immoral? (2) Is (a) refusal to bear arms for one's own country, or alternatively, (b) refusal to serve in a work or labor camp in time of war, moral or immoral?

On the one hand, emphasizing patriotism, majority rule and welfare in a democratic society such as ours, there is the view, held by most citizens, that all have a duty or obligation—in essence a moral or morally defensible one—to support and defend our country in time of war. Contrariwise, underlining good faith matters of individual conscience or religion, there is the view held by Mr. Brooks (the applicant herein) and, generally, by conscientious objectors that (paraphrasing Voltaire) the killing of human beings in wartime is immoral, and nonetheless murder, despite the numbers involved and the sound of trumpets.

The fact that the differing viewpoints are by their proponents held most strongly and in good faith, and that each view can be rationalized in terms of well meaning, constructive social objectives, complicates rather than simplifies the problem.

Generally speaking, in a legal context of standard,

and orthodox dimensions, recognition of an inconsistency in moral values may seem surprising, with even an appearance or sound of strangeness. However, in terms of common experience, differences of opinion as to moral values actually should not seem too surprising. In any event, with the problem in this appeal in the above-indicated posture, it follows that it is not one to be resolved by reference to absolute or objective standards; nor is it a matter of compromise and attempting to work out a nice balance between competing or conflicting ideas. The case simply has no easy, black-or-white solution. Decision requires a clear-cut choice and approval of one or the other of two inconsistent moral values, each having strong, persuasive, emotional overtones. In other words, I am convinced that the decisional function herein is purely and simply a matter of value emphasis and personal judgment. While philosophical discussion can be intense and spirited, usually stress and strain, in terms of conscience, emotions, and personal responsibility, is minimal. In contrast, judicial decision herein has been most troublesome for me, in terms of conscience, emotions, and personal responsibility, and I daresay for other members of this court.

In the instant case it is clear that the applicant, Robert Boland Brooks, has for many years, as a matter of conscience or religion, been opposed to war and military service, labor, or work camps, and to conscription of any kind in times of war. During World War II, he made his position known forthrightly and unequivocally to his local draft board and to the local office of

the United States district attorney. He did register for the draft; but, when ordered to report for his physical examination, he refused to comply and duly notified the draft board of his intentions. He was, in fact, classified as a conscientious objector (4-E) by his local draft board. Thereafter, he was ordered to report to a labor camp for conscientious objectors which was maintained under the selective service system at Mancos, Colorado. Mr. Brooks again forthrightly advised both his draft board and the United States attorney's office that he would not comply with the order. Thereupon, he was indicted and convicted for violation of the selective service act. The United States Court of Appeals affirmed his conviction (*Brooks v. United States*, 147 F.(2d) 134); and the United States Supreme Court denied certiorari (324 U. S. 878, 89 L. Ed. 1430, 65 S. Ct. 1027). It should be pointed out that Mr. Brooks was convicted not because he refused to serve in the armed forces of his country, *but solely* because of his refusal to report to the wartime labor or work camp for conscientious objectors.

At the time of trial, Mr. Brooks waived a jury. His only defense was that the selective service act, which he admitted having violated, contravened what he conceived to be his constitutional rights. He made a formal statement, setting forth his reasons for refusing to report to the Colorado work camp, saying among other things:

"I do not believe that under the Constitution Congress has the right to deny freedom of conscience, *or to compel men to do an act which their conscience tells them is morally wrong.*" (Italics mine.)

Incidentally, he further stated that he hoped to convince others, by his example, to share his views.

Finally, at the hearing before the Board of Governors of the State Bar Association on his application for admission to the practice of law in the state of Washington, Mr. Brooks, in effect, represented that he did not think the situation which confronted him during World War II could occur again because of his age, and otherwise; but, if it should, he felt that his course of conduct would likely be the same as before, although his experience in prison (upon his conviction he served twenty-two months of a three-year sentence) was one he would not wish to undergo again.

As will be gathered from the foregoing, our task is to determine whether Mr. Brooks' conduct and attitude, and his felony conviction for violating the Selective Service Act, disqualifies him on moral grounds for the practice of law in this state.

The authority of this court to promulgate rules setting forth the qualifications to be met by an applicant for the practice of law in this state is unquestioned. Of course, the qualifications set forth must bear some rational connection to the applicant's overall fitness for the practice. *Schware v. Board of Bar Examiners of New Mexico* (1957), 353 U. S. 232, 1 L. Ed.(2d) 796, 77 S. Ct. 752, 64 A. L. R.(2d) 288.

The dissenting opinion herein states the case for Mr. Brooks, in terms of positive moral values, as strongly as could be done. It refers to the history of conscientious objection to war in our country. In effect, the dis-

sent concludes that good faith matters of conscience supervene and transcend policy and law of temporal governments; that conscientious objection to war, and *conduct patterned accordingly, is not immoral, but, on the contrary, is highly moral in nature.* I certainly can understand and wish for the universal acceptance, application and legal validity of this point of view. However, the dissent's thesis is the statement of an *ideal,* which, unfortunately, has not yet been achieved. We do not live as individuals; nor do nations exist in an ideal world society, free from war, controlled and ordered by an ideally conceived world rule of law.

The Selective Service Act accorded to Mr. Brooks the status of a conscientious objector. As a matter of national policy, it excused him from compulsory military service. However, the act did not excuse him, as a matter of policy or otherwise, from noncompliance with its conditional requirement that he report to a work camp for conscientious objectors. This conditional requirement was, I think, under all the circumstances, a reasonable, rational, and even a morally justifiable one. The Selective Service Act actually did not outlaw Mr. Brooks' freedom of belief; in fact, in giving him the status of a conscientious objector and excusing him from compulsory military service, the act recognized his freedom of belief and, I think, provided reasonable latitude relative to action and conduct. In my judgment, with emphasis on the practicabilities of the far-from-ideal world society in which we live, the refusal of Mr, Brooks to comply with the conditional requirement of the act—that he report to a work camp

— was unreasonable and not morally justifiable. Furthermore, I believe a rational connection exists between Mr. Brooks' conduct and his fitness to practice law. At the same time, I cannot agree with the rather broad implication of the majority opinion that a conscientious objector *per se* is morally unfit to practice law in this state.

The crux of this matter as I see it is Mr. Brooks' past and present basic position—that the government cannot compel him to do any act which, in terms of conscience or religious concepts, he personally believes to be morally wrong — manifested by (a) his affirmative conduct in refusing to report to the work camp in Colorado when ordered so to do, (b) his felony conviction, and (c) his current affirmation of views and previous conduct, evidenced by testimony at the hearing before the Board of Governors of the State Bar Association.

Undoubtedly, under the advocacy concept of our legal system, attorneys are expected to question and, in a sense, to oppose government policies and law in a legal, orderly manner in seeking to protect either their own personal interests or those of their clients. However, at the same time, members of the legal profession are officers of our courts. As such they, perhaps more than other citizens, have a basic duty of obedience to the law and a fundamental obligation to sustain and support the government of which they are citizens — particularly in times of national emergency.

In my best judgment, Mr. Brooks has, by his attitude

and conduct (evidenced by the record), demonstrated traits of character which do not have to be approved and countenanced by the members of the legal profession of our state. I believe that, under the "*rational connection*" test announced in *Schware v. Board of Bar Examiners, supra,* the particular traits of character displayed by Mr. Brooks disqualify him for the practice of law in the state of Washington.

Parenthetically, or by way of epilogue: If, as understandably may happen, this matter should be the subject of further appellate review by the United States Supreme Court, we, as a state court, shall of course accede to the resolution of this matter as reached in that court. However, in my opinion, one would be hard put to find any significant basis for making a distinction between the nature of the judicial function here and there, insofar as the instant case is concerned. In other words, review on the merits would simply mean nothing more than a substitution of personal value emphasis and judgment by a majority of the members of the United States Supreme Court for the personal value emphasis and judgment of a majority of the members of our own state supreme court. Lastly, if there should be further appellate review, it can be hoped that the result, whatever it is, may be articulated as realistically as has been attempted herein.

On the basis indicated hereinbefore, I concur in the disposition of this matter recommended by the Board of Governors, and in the result reached in the majority opinion.

HILL, J. (dissenting)—The board of governors of the Washington state bar association has refused the application of Robert Boland Brooks to take the bar examination.

The majority has, with admirable brevity, set out the gist of this controversy in these words:

"The board of governors made the finding:

" 'That if the applicant, Robert Boland Brooks, be found to be a man of good moral character, he has otherwise complied with all of the requirements necessary to entitle him to take the bar examination as a general applicant.'

"The act of the board of governors in finding that the applicant is not a man of good moral character, is not arbitrary or capricious. We adopt its finding that 'The acts of the applicant . . . were unjustifiably defiant of the laws of the United States.' "

The applicant asks that we review the evidence before the board of governors; and that we conclude therefrom that he is a man possessing good moral character, and entitled to take the bar examination.

The final determinations in questions of admission and disbarment are, of necessity, ours; but we attach great importance to the determinations of the board of governors relative both to admissions and to disciplinary proceedings. The board renders a tremendously valuable service in these areas; indeed, an indispensable one. We do not, however, as the majority seems to hold, have to find that the board acted arbitrarily or capriciously before we can arrive at a conclusion different from that of the board on the same

record. *State ex rel. Laughlin v. Washington State Bar Ass'n* (1947), 26 Wn. (2d) 914, 176 P. (2d) 301; *In re Levy* (1945), 23 Wn. (2d) 607, 161 P. (2d) 651, 162 A.L.R. 805; *In re Bruen* (1918), 102 Wash. 472, 172 Pac. 1152; *McVicar v. State Board of Law Examiners* (D.C. Wash. 1925), 6 F. (2d) 33. See also *In re Day* (1899), 181 Ill. 73, 54 N.E. 646, 50 L.R.A. 519.

The issue is: Does the record before the board of governors, and now before this court, disclose that the applicant does not possess a good moral character? In one sense, it is a very narrow issue; yet, paradoxically, it is very broad. This is true because our concept of what constitutes moral turpitude, or what constitutes a good moral character may be widely divergent.

There are things the applicant has done that I would not do; there is much that he believes, with which I would disagree. I find it difficult to comprehend the appeal for the shelter of the constitution by one who is unwilling to defend it. I look askance at one who, asserting his right to freedom of religion, refuses to have any part in resisting an enemy who declared war upon us and whose first act in every land invaded was to abolish freedom of religion. Nothing that the applicant has done or believes, however, convinces me that he is not a man of good moral character acting in accordance with the dictates of his conscience.

The applicant asked, and was accorded, the status of a conscientious objector—opposed to combatant and noncombatant military service. No one has seriously suggested that being a conscientious objector *per se*

establishes an absence of good moral character, although the majority seems to imply as much in this sweeping statement near the end of the opinion:

". . . A loyal and discerning citizen is aware of his great heritage of liberty and acknowledges his duty to do his share in preserving it. Without a sense of duty, the applicant does not measure up to the standard of citizenship rightly expected of an attorney at law." This overlooks the fact that there may be a conflict between duty to God and duty to country. Duty to a moral power higher than the state has always been maintained. Long ago Mr. Justice Story in his Commentaries on the Constitution of the United States, Vol. II (5th ed.), § 1876, p. 631, said:

". . . The rights of conscience are, indeed, beyond the just reach of any human power. . . . "

Mr. Chief Justice Hughes in his famous dissent in *United States v. Macintosh* (1931), 283 U.S. 605, 627, 75 L. Ed. 1302, 51 S. Ct. 570, in which he was joined by Justices Holmes, Brandeis, and Stone, said (p. 633):

". . . But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. . . . "

and, further (p. 634):

". . . And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. . . . "

However, as a conscientious objector opposed to both

combatant and noncombatant service, the applicant was still subject to the requirement that he perform "work of national importance" under civilian direction. (See § 5(g) Selective Training and Service Act of 1940, 54 Stat. 889, 50 U. S. C. A. Appendix § 305(g).)

It was the applicant's refusal to report to a so-called civilian public service camp to perform such "work of national importance," which the board of governors found to be "unjustifiably defiant of the laws of the United States."

The applicant was indicted, tried, and convicted for his refusal to report to such a camp.

It is here that we must find the real basis, if there is any, for the finding that the applicant is not a man of good moral character.

Certainly the conscientious objector sent to a civilian public service camp was treated as a "second-class citizen." He was

"... compelled to labor in Civilian Public Service without remuneration. His dependents had to fend for themselves without government aid or benefits of any kind. He was left financially unprotected in case of injury or death during his service, except where he was assigned to work covered by state workmen's compensation laws. These three severe financial penalties were deliberately inflicted on men who allowed their consciences to direct them into civilian rather than military service.

"This made a virtual farce of freedom of conscience. In practice, men had to pay for their conscience by the impoverishment not only of themselves but of their

families. . . . In the opinion of the American Friends Service Committee, such a situation could not 'long continue without jeopardy to the health of our democracy. Equal respect and consideration for the welfare of all its citizens should prevail if we are to maintain the foundation principles of our nation.'" Conscription of Conscience, Sibley and Jacob, pp. 216, 217.

On his trial in the United States district court for failure to report for transportation to a civilian public service camp for work of "national importance," and on his appeal from a conviction for that offense to the circuit court of appeals for the second circuit, the applicant at all times took the position that he was conscientiously opposed (by reasons of religious training and belief) to any form of compulsory labor in civilian camps; and he also raised certain constitutional issues, including: whether the service required constituted involuntary servitude or the taking of "property" without just compensation.

In the briefs submitted by the board of governors much is made of the fact that the applicant raised these additional issues, in addition to his claim that he was a conscientious objector to such service. To me, they were issues he was entitled to raise, and took nothing away from his stand as a conscientious objector.

His conviction was affirmed. He served twenty-two months of a three-year sentence before he was paroled.

The applicant was defiant of the laws of the United States. He deliberately chose the alternative of imprisonment in a penal institution to service in a civilian public service camp. Does that brand him as having

committed an act involving moral turpitude, and as a man "not of good moral character?" I think not. Through the centuries men and women have suffered death and imprisonment rather than forfeit their integrity of conscience.

I am not saying that his imprisonment was not justified; from the standpoint of the government, there was no reasonable alternative. The Selective Service Act demanded the most serious sacrifies from men of the same general class as the applicant. The morale of those in the armed forces required that conscientious objectors should not wholly escape all service. Relieving the conscientious objector entirely of any obligation to render services would obviously not accord with the principle of equality upon which the Selective Service Act is based. If conscientious objection to military service were rewarded by complete exemption, it would be more difficult to distinguish between men who are honestly urging conscientious objections and those urging such objections for personal, material benefits. As said in *Weightman v. United States* (1944 C.C.A.1st) 142 F. (2d) 188, 192:

" . . . If conscientious objectors should simply be excused from the burden of military duty cast upon other men of like age, employment and family responsibilities, thereby leaving them free to enjoy civilian life, no doubt some, maybe many, men would falsely profess conscientious objections only to obtain the privileged status of exemption. To weed out the insincere and thus avoid an obvious abuse, the way of the honest conscientious objector has been made hard. . . .

I am saying, however, that having refused—because

of adherence to a firmly-held principle—to go to a work camp; and having paid the penalty of imprisonment for twenty-two months, does not indicate a lack of moral character.

A recent holding is that one can be "unjustifiably defiant of the laws of the United States," and refuse to pay an income tax, and still not be guilty of an offense involving moral turpitude. In *In re Molthan* (1958), 52 Wn. (2d) 560, 562, 327 P. (2d) 427, Molthan filed returns but refused to pay taxes because

"'. . . he maintained he was a second class citizen of the United States by virtue of the fact that he had been without trial, denominated a security risk, and that such a finding denied to him his usual employment as an attorney.'"

Let us suppose that, in 1776, certain colonists believed so strongly that there should be no taxation without representation that they went to prison rather than pay certain taxes. Did a breach of duty to obey the law and imprisonment therefor establish a lack of moral character, or did it establish that they were men of deep and strong convictions?

It is well established that Henry David Thoreau, whose essay entitled On the Duty of Civil Disobedience is a classic, was jailed in Concord for his refusal to pay his poll tax—a protest against a government that supported slavery. There is a legend that his friend Ralph Waldo Emerson visited Thoreau in jail, and asked "Henry, why are you here?" and that Thoreau rejoined "Waldo, why are you not here?"

I am challenged, in a day when the trend is to sacrifice principle to expediency, by one who preferred to go to jail rather than do what his conscience said he should not do. In any event, I can find no moral turpitude here, and no lack of moral character.

Finally, there is no rational connection between the claimed disqualifying acts and the applicant's fitness to practice law. *Schware v. Board of Bar Examiners of New Mexico* (1957), 353 U.S. 232, 1 L.Ed. (2d) 796, 77 S.Ct. 752, 64 A.L.R. (2d) 288, quoted in *In re Flynn* (1958), 52 Wn.(2d) 589, 328 P. (2d) 150.

I would enter an order directing that Robert Boland Brooks' application to take the Washington state bar examination be granted.

FOSTER, J., concurs in the views expressed by HILL, J.

ROSELLINI, J., concurs in the result of the dissent.

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No. 594

In the
Supreme Court of the United States

OCTOBER TERM, 1960

In the Matter of the Application of ROBERT BOLAND BROOKS for Admission to Practice Law in the State of Washington.

ROBERT BOLAND BROOKS, *Petitioner,*

vs.

THE BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

T. M. ROYCE,
Counsel for respondent, the Board of Governors of the Washington State Bar Association

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Washington, filed September 29, 1960, is reported beginning at page 773 of 156 Wash. Dec., 355 P.2d 840, and is set out as Appendix A to the petition, pp. 33-51 (Suppl. R). The findings and order which constitute the opinion of the Board of Governors of the Washington State Bar Association, the administrative agency designated to pass upon the fitness of applicants to the bar, are not reported; they are in the record (R. 140-143) and are set out in the appendix to this brief (App. 13A-16A).

JURISDICTION

It is respectfully submitted that the court ought not take jurisdiction in this case.

No federal question was properly raised below. Petitioner neither quotes nor summarizes the manner of presenting the claimed federal question below (Rule 23(f)). He states (Pet. p. 6) he raised the federal question in his briefs; in a brief to the board of governors (R. 22-27) and in a brief to the Supreme Court (R. 222-232). It is submitted that examination of the brief to the board of governors (R. 22-27) will demonstrate that no federal question was raised there. *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655. He made no reference to a federal question in any petition or other pleading below. There is none in his application to the board of governors (R. 19-20) and none in his petition to the Supreme Court (R. 144-165). *Hulbert v. Chicago,* 202 U.S. 275. Presentation of a federal question in briefs is not adequate. *Live Oak Assn. v. Railroad Comm.* 269 U.S. 354, 357-8; *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54. It was not passed on by the Supreme Court. *Bailey v. Anderson,* 326 U.S. 203, 206-7; *Osborne v. Clark,* 204 U.S. 565, 567-8.

The State Court decision rests upon a non-federal ground. Petitioner as a draft registrant in 1944 was convicted of the crime of failing to report for work of national importance after having been classified IV-E, exempt from military service both as a combatant and non-combatant. He was sentenced to a term of three years (R. 151). In 1958 he applied to the board of gov-

ernors of the Washington State Bar Association to take an examination for admission to practice law in Washington (R. 4-17). The board, after considering written material filed by him and his oral testimony before the board (R. 107-139) found he was not of good moral character and denied his application (R. 140-143; App. 13A-16A).

The board's conclusion of lack of good moral character is on more than one ground. One is that the board found his crime involved moral turpitude (R. 141; App. 14A). Another is that the board found Mr. Brooks gave a false reason for his opposition to going to the work camp (R. 142, par. 9; App. 15A). The reason he gave was that his religious convictions caused him to refuse. His real reason, the board found, was his constitutional and legal objections to the work camp and the arrangements provided for the workers (R. 142; App. 15A):

> "9. That notwithstanding the fact Mr. Brooks assigns his religious tenets as the basis for his refusal to attend the Civilian Public Service Camp the board finds that the true reasons therefor were the applicant's contentions: * * *" (Here follow a list of legal objections.) (R. 142, App. 15A).

Under the Washington State Bar Act (Laws 1933, chap. 94, p. 398-400; App. 1A) and the rules for admission (34A Wn.2d pocket part, 36-51; App. 2A-4A), the board of governors is the administrative agency to determine the facts as to an applicant's moral fitness. The findings and order of the board constitute its opinion. They are not included in the petition here

(Rule 23 (i)). They are printed in the appendix to this brief (App. 13A-16A). The Supreme Court, after considering the entire record including Mr. Brooks' testimony before the board held that the board had not acted arbitrarily or capriciously and adopted the board's finding that Mr. Brooks was unjustifiably defiant of the laws of the United States (156 Wash., Dec. 773; 355 P.2d 840; Supp. R., App. A. to Petition, p. 35).

The board, having heard the testimony of Mr. Brooks, is, under rules of practice in Washington, considered best able to judge of his truthfulness. *Re Dailey*, 37 Wn.2d 673, 225 P.2d 900; *Re Little*, 40 Wn.2d 421, 244 P.2d 255.

The decision of the board did not rest alone upon a ground which the petitioner claims to be a federal ground. It rests on, among other grounds, the fact that petitioner made a false statement in support of his application for admission (R. 142; App. 154). The Supreme Court affirmed the action of the board (Suppl. R.; Pet. App. p. 36). The decisions, therefore, rest on a non-federal ground, namely, that petitioner made a false statement in his application for admission (R. 142; App. 15A). *Herb v. Pitcairn*, 324 U.S. 117, 125-126; *Lagnes v. Green*, 282 U.S. 531, 535-539; *Walling v. General Industries Co.*, 330 U.S. 545, 547.

There is no substantial question presented. A decision in this case would apply to an applicant for admission to the practice of law, who

1. Was admitted in another state 14 years previously

and at that time took an oath to support the Constitution of the United States.

2. Nine years after so becoming a lawyer had violated the draft law;

3. Had violated it and his oath by refusing to do work of national importance after having been classified as not subject to military duty of any kind, combatant or non-combatant;

4. Had been convicted and sentenced to a term of three years;

5. States that under the same circumstances he would do the same thing again;

6. States that he has not repented and been rehabilitated;

7. Has falsely stated that his reason for refusing to do work of national importance was his religious convictions, whereas his real reason was the claim of his constitutional and legal rights.

8. Is still subject to disbarment proceedings on account of his conviction in the state that first admitted him, to which he has not returned since conviction.

It cannot be contended that such applicants comprise a large number of people. In fact, such seems to be conceded by petitioner. For he seeks to draw into his class to make it larger doctors, dentists and accountants (Pet. p. 11). Such effort is best answered by the language of the court in *In re Day* (Ill.) 54 N.E. 646, at 653:

"The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers

and persons following other professions or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question. A license to such persons confers no right to put the judicial power in motion or to participate in judicial proceedings."

Petitioner cites statistics from a book not in evidence or submitted to the board of governors to the effect that during the five years of the Second World War about 1,000 men a year were convicted of being conscientious objectors (p. 8). Such convictions really mean that the accused were not conscientious objectors, but were convicted of falsely asserting that they were. A really conscientious objector to military service could not be convicted. Petitioner offers no statistics of the number of men who were convicted of his offense—conscientious objectors who refused to obey an order to do work of national importance—much less those who violated an oath in so doing.

The decision below is in accord with the decisions of this court. Petitioner, on oral examination before this board, stated in effect that under the same circumstances he would again refuse to do work of national importance (R. 126-127).

In *In re Girouard,* 328 U.S. 61, it was held that an alien was not qualified for citizenship unless he could agree to serve in some capacity as directed by the Government in time of war, even though the inability to serve was because of religious convictions. In *In re Summers,* 325 U.S. 561, it was held that Summers was

properly denied admission to the practice of law by Illinois because he could not take the oath of admission without reservation. His reservation would have been that he would not, for religious reasons, serve in the state militia. The Illinois constitution required such service, as does Washington's constitution, Article X, Sec. 1:

> "All able bodied male citizens of this state between the ages of eighteen and forty-five years except such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty." (Wash. Const.)

In Washington, before admission, an applicant is required to take an oath:

> "I do solemnly swear: * * * I will support the constitution of the United States and the constitution of the state of Washington." (Rules for Admission, Rule 5, 34AWn.2d pocket part 48).

The effect of *Girouard* decision is that petitioner when he refused to do work of national importance violated the oath he took at the time he became a lawyer in New York promising to support the constitution of the United States. A further effect is that because petitioner cannot agree to do work of national importance he cannot take the oath to support the constitution. The effect of the *Summers* decision is that such inability is reason to deny him the right to be admitted to the practice of law.

State remedies have not been exhausted. The petition here consists in the main of a critical analysis of the reasoning and discussion of the language used by

the Supreme Court (Suppl. R., Pet. App. A, 36-51). Yet, petitioner did not avail himself of the right to ask the Court for a rehearing (Resp. R. 1).

> "Any party to an appealed case may, after an opinion has been filed, present to the court in the manner and time as hereinafter provided, a petition for rehearing. Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed." (Rules of the Supreme Court on Appeal Rule 50, 34A Wn.2d pocket part p. 20).

Cf.: *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551.

The decision below is correct. Under the facts in this proceeding the decision of the Supreme Court of Washington is correct in reason and authority. This is amplified in the Argument, *infra*, pages 13-17.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following are involved:

Article X, Section 1, of the Washington State Constitution, printed in the Appendix page 17A.

State Bar Act, Laws of Washington 1933, Chap. 94, Sec. 6, p. 398, Sec. 8, pp. 399-400, Appendix page 1A.

Rules for admission to practice law, 34A Wn.2d, pocket part; Rule 1, page 36; Rule 3, page 44; Rule 2, pages 37-38; Rule 4, pp. 45-46; Rule 5, p. 47; Rule 6, pp. 49-50, Appendix pages 2A-4A.

Rule 10, subd. 8 of Rules for Discipline of Attorneys, Vol. 34A Wn.2d page 183, Appendix page 17A.

Oath of attorney, 34A Wn.2d 165, Appendix 17A.

Rule 50 of Rules on Appeal, Vol. 34A Wn.2d pages 20-21, pocket part, Appendix page 17A.

QUESTIONS PRESENTED

Petitioner has applied for admission to practice law in Washington. He was previously admitted to practice law in New York, and then took an oath to support the Constitution of the United States; 9 years later he was convicted of the felony of failure to report for work of national importance under the draft law and served 22 months of a three-year sentence; 13 years have elapsed since his release from prison; he is subject to disbarment proceedings in New York on account of his conviction, and has been told that if he resumed practice in New York proceedings might be instituted for his disbarment; he has not returned to New York since his release. He states that under the same circumstances he would again refuse to do work of national importance, that he has not repented and been rehabilitated. Washington finds the fact to be that he made false statements as to his reasons for refusing work of national importance, namely, that he said they were based on religious convictions, whereas in fact his reasons were based on constitutional and legal grounds.

Under such circumstances

(a) Does Washington have the right to deny him admission to the bar?

(b) Is a federal question presented?

STATEMENT OF THE CASE

Mr. Brooks was born in Berkley, Kentucky, January 5, 1909 (R. 5). He was admitted to practice law in New York in 1934 (R. 110). He took an oath to support the Constitution of the United States: "As a member of the Bar, I have sworn to uphold the Constitution of the United States and of the State of New York" (R. 160). He is married, has no children (R. 113). From 1934 to 1943 he practiced law in New York City as a member of successive firms (R. 110). He registered for the draft and was classified as 3-A which meant temporary exemption because he had a dependent (R. 87).

In February, 1941, he went to Washington, D.C., as a staff member of the "National Service Board of Religious Objectors" (R. 111; R. 149). Pearl Harbor was December 7, 1941. He continued in this work without pay until in March of 1943 (R. 111, 149). He then had a telephone call from one of his partners; his work for the conscientious objectors was embarrassing to the law firm. He resigned from the firm (R. 111). He was then a member of the Christian Church but was "certainly not very active." He had been attending the Society of Friends, but was not a member (R. 112; App. 5A).

He was notified by his draft board to appear for physical examination on June 25, 1943 (R. 84). He did not appear (R. 86) and was classified as delinquent (R. 90). A little later he was classified as IV-E (R. 92, 115) and taken off the delinquent list (R. 95). Classification as IV-E meant he was exempt from entering

the army either as a soldier or for non-combatant duty. It meant he was still subject to being directed by the draft board to do work of national importance (R. 115; App. 5A). He wrote to the draft board and to the United States attorney giving thanks for this classification (R. 93, 94).

He was ordered to report on October 18, 1943, for transportation to work. He had been assigned to assist in the construction of an irrigation dam in Colorado, and to be stationed at Camp Mancos (R. 116, 150; App. 6A). He did not report (R. 98, 99). He was indicted on November 18, 1943 (R. 150). He filed a demurrer to the indictment and a plea in abatement (R. 151). The plea is set out in the record of petitioner's appeal to the Circuit Court, pages 6 to 11, sworn to by petitioner, contained in the folder R. 105.

Judge Rifkind overruled petitioner's demurrer to the indictment and sustained the Government's demurrer to his plea in abatement. *U.S. v. Brooks*, 54 F. Supp. 995 (R. 151). Trial was before Judge Henry W. Goddard without a jury (R. 151, 105). Petitioner was adjudged guilty of the charge in the indictment that he "unlawfully and knowingly did fail and neglect to report . . . for said transportation and instructions for assignment for work of national importance" (R. 105, Ex. B, p. 3). He was sentenced to three years imprisonment which began May 26, 1944 (R. 151). He was released on parole in April, 1946 (R. 120). While he was confined his appeal was prosecuted. The judgment was affirmed. *Brooks v. U.S.*, 147 F.2d 134; Cert. denied 324 U.S. 878.

From April to October, 1946, petitioner did clerical work in a hospital in Boston (R. 119, 5). He then came to the State of Washington (R. 119, 5). He was told in 1946 by his counsel that disbarment proceedings might be instituted if he resumed practice following his release from prison (R. 12).

> "No disbarment proceeding in New York State was brought against me following my conviction for violation of the Selective Service Act. An informal inquiry in 1946, by my counsel, Ernest Angell, indicated that such a proceeding might be instituted if I resumed practice following my release from prison." (Page 9 of "Application for Registration" R. 4-17, at R. 12).

He did not return to New York. The only employment he has had since coming to Washington is from October, 1953, to March, 1958, when he was executive secretary of the Washington Chapter of the American Civil Liberties Union. The remainder of the time he has devoted to managing his own property and investing and speculating in the stock exchange (R. 113).

October 27, 1958, he filed his application for registration to take the Washington state bar examination (R. 4-17). Upon consideration, the board notified petitioner his application did not compiy with the rules for admission (R. 18). January 19, 1959, petitioner, through his attorneys, asked the board to reconsider its ruling and afford him an oral hearing (R. 19-20). At the request of the board he supplied copies of the record of his trial, and correspondence with his draft board and the United States District Attorney concerning his violation of the draft law (R. 84-104, 105).

He appeared before the board of governors for oral examination on April 24, 1959 (R. 107-139). Excerpts of his testimony are printed in the Appendix to this brief (App. 5A-12A). The board also considered letters of recommendation filed by him (R. 28-77). On June 26, 1959, the board made its findings and order denying Mr. Brooks' application (R. 140-143; App. 13A-17A).

On July 28, 1959, petitioner filed his petition in the State Supreme Court. He asked the Court to direct the board to transmit to the Court all of its records as to petitioner, and that it order the board to permit him to take the bar examination as a general applicant, or, in the alternative, that the petition be treated as an application for a writ of certiorari to the board (R. 144-146). The Court ordered the board to transmit its records (R. 166-167). The board, on direction of the Court, filed a brief (R. 279-350) and argument was had before the Court. The Court's opinion affirmed the action of the board (Sept. 29, 1960, 156 Wash. Dec. 773; 335 P.2d 840; petitioner's App. 33-51).

ARGUMENT

By the laws of Washington and the rules of admission of the Supreme Court, the board of governors of the Washington State Bar Association is made the administrative agency of the court to determine the moral fitness of applicants for admission to practice law (App. 1A-4A). Having heard the petitioner's testimony, the board is in the best position to judge of his truthfulness. It has found that he did not tell the truth

(R. 142; App. 15A). That in itself is sufficient ground for denying his admission.

When he violated the draft law he committed an act of moral turpitude. He was then under oath to support the constitution of the United States. He broke the law and violated his oath. He failed knowingly in the performance of his duty. Besides, he swore falsely when he took the oath to support the constitution, for he says that since 1925 he has had the same beliefs that caused his violation of the law (R. 127). He took the oath in 1934 (R. 160).

Now he asks the opportunity to take the same oath, at the same time saying that he will not keep it, that if the occasion presents he will violate it the same as he did the first oath. He justifies his attitude by presenting the philosophy that no matter what a person does, if it is done in the name of religion it is justified. He stated in his brief to the Supreme Court:

> "May a state refuse to admit to its bar an otherwise qualified person solely on the ground of conduct arising out of his religious convictions?" (R. 221)

and he says the answer is "No." And he does not limit what the conduct may be. In the nature of things he could not, for, if he limits the kind of conduct that may be excused, his whole argument falls. For then he permits decision as to whether the particular conduct is within the class that may be excused.

Even now he is subject to disbarment, if he should return to New York. *In re Greenberger,* 38 N.Y.S.2d

758. If he should be disbarred there after admission in Washington, he would be subject to disbarment in Washington. Rule 10 of Discipline of Attorneys, 34A Wn.2d, page 183, subd. 8, makes "Disbarment by a foreign court of competent jurisdiction" grounds for disbarment in Washington. If such should occur there would be loss of prestige to the 3,500 lawyers of the State of Washington, whom he seeks to join. An act of selfishness, lack of concern for the rights of others, is an act lacking in good morals, the degree varying with enormity of the act. Without putting his own house in order, petitioner seeks to enter the house the lawyers of Washington have built.

And they have built it by adhering to the strictest rules of all professions. It is the only profession which announces to the public that it maintains an agency to which the public may come for redress of grievances, —an agency which takes cognizance not only of conduct considered wrong by the public but also of conduct violative of higher standards set by the profession itself.

Petitioner is perhaps the only man who has had the temerity to ask for admission to one bar while there is hanging over him the possibility of disbarment in another.

He cites the 41 letters of recommendation which he filed with the board (Pet. pp. 23-25). Evidently he has not told most of the writers of the nature of the offense for which he was convicted. For most of them state he was convicted of being a conscientious objector. These may very well believe he was unjustly convicted of

being a draft evader because the jury mistakenly did not believe that he conscientiously objected to serving as a soldier. None of the letters came from any one who knew him while he was practicing law in New York. None of them came from any of his former law associates in New York.

There is no analogy between petitioner's situation and that of Konigsberg or Anastaplo. (*Konigsberg v. State Bar of California*, 353 U.S. 262; *In re Anastaplo*, 163 N.E.2d 429). Both stated they were not Communists, and then refused to answer any other questions testing that answer. It was held in the *Konigsberg* case that no inference of misconduct could justifiably be drawn from such refusal that warranted denial of admission to the bar. In the *Anastaplo* case the court held simply that without further information the Committee could not be certain enough of the facts to enable it to certify that Anastaplo was fit for admission. Here inferences are not involved. We have the concrete evidence of petitioner's violation of law, his giving of false reasons for his violation, his assertion that he will do it again if occasion arises. Certainly these acts and characteristics have a connection in common experience in relation to the circumstances of life to justify the action of the board and of the court.

No analogy can be drawn between the situation of petitioner and that of those lawyers who have been disbarred and later reinstated. Such lawyers, before reinstatement, must show that they have been rehabilitated, that they have acquired a new character. *In re Bruener*, 178 Wash. 165, 34 P.2d 437; *In re Loner-*

gun, 23 Wn.2d 767, 162 P.2d 289. It is said in petitioner's brief to the State Supreme Court: "We do not contend that Mr. Brooks has repented and has been rehabilitated . . . " (R. 235).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

T. M. Royce,
Counsel for respondent, the Board of Governors of the Washington State Bar Association

APPENDIX

WASHINGTON STATE BAR ACT

(Laws of 1933, Chap. 94)

(Revised Code of Washington 2.48.060 and .080)

Sec. 6. *State Bar Governed by Board of Governors.* The state bar shall be governed by the board of governors which shall be charged with the executive functions of the state bar and the enforcement of the provisions of this act and all rules adopted in pursuance thereof. The members of the board of governors shall receive no salary by virtue of their office. (Laws of 1933, p. 399; RCW 2.48.060).

* * *

Sec. 8. *Admission and Disbarment.* The said board of governors shall likewise have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; and, with such approval, to establish from time to time and enforce rules of professional conduct for all members of the state bar; and, with such approval, appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing county or district agencies to assist therein to the extent provided by such rules: Provided, however, That no person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same. Laws of 1933, pp. 399-400; RCW 2.48.080)

RULES FOR ADMISSION TO PRACTICE
(34A Wn. 2d, pocket part pages 36 to 51)

RULE 1. *Classification of Applicants.* Every person desiring to be admitted to the bar of the state of Washington must pass a bar examination and satisfy all of the requirements of these rules applicable to the classification of applicant to which he belongs. For the purpose of these rules, applicants for admission to practice in the state of Washington are classified either as "general applicants" or as "attorney applicants." (p. 36)

(Note: Mr. Brooks applied for admission as a general applicant, for the reason that he did not qualify as an attorney applicant, not having practiced law within the prior three years, since Rule 3, subdivision 7, provides: "* * * The application of such (attorney) applicant shall not be approved by the board of governors unless it shall be presented within a period of three (3) years from the termination of the period during which the applicant was actually engaged in such practice * * * " (p. 44))

RULE 2 provides that general applicants "in order to be permitted to take the bar examination, must

* * * * *

"5. be of good moral character;

"6. execute under oath and file with the executive secretary of the state bar association not less than thirty (30) days prior to the examination date, his application in duplicate, one of which shall be in his own hand writing, in such form as may be required by the board of governors. Additional proof of any fact stated in the application may be required by the board. In the event of the failure or refusal of an applicant to furnish any information or proof, or to answer any interrogatories of the board pertinent to the pending ap-

plication, the board may deny the application. The form of application shall be provided by the board, and the contents thereof shall be such as the board may direct from time to time." (pp. 37-38)

RULE 4. *Examinations.* A. *General Applicant's Examination—How Conducted.* The general applicant's examination shall be conducted by and under the direction of the board of governors, who shall, for the purpose of conducting such examination, appoint a committee of three (3) or more active members of the state bar, and this commitete shall be known as the committee of law examiners. The examination shall consist of such questions as the committee may select on such subjects as may be listed by the committee and approved by the board of governors. The board shall furnish to this committee such clerical or other assistance as in the discretion of the board shall be deemed necessary. The executive secretary of the state bar association shall certify to this committee, on or prior to the morning of the first day of each examination, the names of those whose applications for examinations have been approved by the board of governors. * * * * * (p. 45-46)

RULE 5. *Certification of Results.* A. Upon completion of the examination and the receipt of the certificate from the committee of law examiners, the board of governors shall cause each applicant to be notified of the result of the examination and shall recommend to the supreme court of the state of Washington the admission or rejection of each applicant who has passed the examination, and after such applicant has first taken the oath of attorney as hereinafter provided. (p. 47)

RULE 6. *Special investigations.* The board of governors may refer any application for admission, examination, or registration as a law clerk to any existing

committee of the state bar association or to a special committee thereof for the purpose of investigating and making recommendations on any matter connected with said application. Any applicant for admission, examination, or registration as a law clerk may be required to appear before the board of any committee of the state bar association upon reasonable notice and submit to an examination touching any matter deemed by the board of governors relevant to a proper consideration of the pending application. Failure to appear before the board or any committee as directed shall be sufficient reason for rejection of the application. The board of governors shall have the power to issue subpoenas to compel the attendance of witnesses or the production of books or documents in connection with any such investigation. (p. 49-50)

PORTIONS OF TESTIMONY OF ROBERT BOLAND BROOKS BEFORE THE BOARD OF GOVERNORS APRIL 24, 1959

Questions By Member Alfred McBee

Q. Now, what is your, what was your religious affiliation, Mr. Brooks?

A. What was it at what time, sir?

Q. Well, at the time you resigned from the firm.

A. Well, I suppose at that time I was a member of the Christian Church, but I certainly wasn't very active at that time.

Q. The express thing to which my inquiry was directed was whether or not you were affiliated with any religious organization which had—

A. I had been attending the Society of Friends.

Q. But, you were not a member?

A. Not then a member, that is correct.

Q. Did you thereafter join them? A. I did.

Q. When?

A. I think it was 1951, or '52 here in Seattle. My wife and I joined the University Friends meeting (R. 112)

Q. And you were classified 4-E?

A. That is correct.

Q. Which means, the board said you are a conscientious objector and that you object to both combatant and non-combatant military service?

A. That is correct, sir.

Q. Just pursuant to the statute. Now, we are agreed also, are we not, that the statute in that case provides that one who is so classified may, under the provisions of the statute, be assigned to, under the language of the statute, non-combatant service or assigned rather to

"Work of National importance under civilian direction?" A. That is correct.

Q. And pursuant to that provision of the statute, your draft board notified you to report for physical examination?

A. That is correct.

Q. Preparatory to being assigned to work of national importance under civilian direction?

A. Yes, sir. (R. 115).

Q. But, after you had been classified 4-E, you did then take the physical examination? A. Yes.

Q. And were found to be fit for service? A. Yes.

Q. And you, thereafter, received in due course from your draft board a notice, or order to report to the board for instruction and transportation to a civilian public camp in Mancos, Colorado?

A. That is correct.

Q. That was the customary, or the usual notice in such cases? A. It was.

Q. All right. After receiving that notice, you notified the draft board in writing, by letter, that you would not report and sent a copy of your letter of such notification to the United States District Attorney?

A. I did.

Q. And in that letter you said in substance that you were not going to report, because you believed the law providing for such camps and the methods of the enforcement was unconstitutional?

A. I don't remember the exact terms of that letter, sir, but I certainly said something of that kind.

Q. The language which I have used is my own. Let me put it to you this way: Is that a fair resume of the reasons you assigned?

A. A very fair summary. (R. 116)

Q. All right. I note on the brief, or the transcript of the record, which I have read, that in the stipulation that the reason assigned for it is as follows: "That as such conscientious objector he was opposed to any form of compulsory labor in civilian camps." I, perhaps, paraphrased your exact language, but that is quote and a proper statement, isn't it?

A. I don't want to quibble, Mr. McBee, about the language here and I, certainly, have forgotten what the stipulation of facts did state, but in essence I think this is —

Q. All right. So, the thing I want to be sure of was this, that you declined the military service, both combatant and non-combatant because of your religious convictions and you declined this other matter because of constitutional and legal convictions?

A. I would also have to say they were religious objections as well as constitutional objections. I don't think the legal objections excluded the religious objections to it.

Q. I did not mean to so imply. After your declining to report for transportation to Mancos, Colorado, to the National Public Service Camp, you were in due course indicted for violation of the Selective Service Act for your refusal to go? A. I was. (R. 117)

Q. Now Mr. Brooks, your opposition to the Civilian Public Service Camps, I take it, is based upon the way these camps were established, the way they were run and the compulsory service that was required of the men who were sent to them? (R. 121)

A. They were certainly compulsory by their nature, so it was not that compulsion was involved. My objection to them was how they were being run, the fact the military were actually running these camps, the fact

the work was not of public importance. They were punitive camps where the work could be done. (R. 122)

Q. So, there were two classes of those civilian camps, those operated by the government and those by the religious organizations?

A. That is correct.

Q. And the one you had been assigned to was operated by the government?

A. That is correct.

Q. And a person assigned to that camp, that is, Camp Mancos, was subject to, basically to what amount of military discipline?

A. He came and went at the pleasure of the one in command. They were under military control, rather than civilian direction. (R. 122)

Q. You don't mean they were operated by military men?

A. I think the actual director of the camp was a civilian, but they were operated by Selective Service under the direction of General Hershey and Colonel Kosh of the Infantry.

Q. But, they were run on—for want of a better term—the military principle. You were required to put in a minimum of eight hours a day. If you wanted to go to town you had to have a pass and permission. Those in charge of the camp could impose fines and restrict privileges and so on?

A. I think that is correct.

Q. And your opposition to this service was, oh, among other things, based upon the theory that it was enforced slavery in matters of positions of that kind?

A. That is correct.

Q. Now Mr. Brooks, tell me, do you still have the same convictions relative to the combatant and non-

combatant military service as you had at the time you received your draft notice?

A. I am certainly, I consider myself a conscientious objector, a pacifist. I am still persuaded that violence is not overcome and ended by the use of violence. I have found no reason to retract the principles upon which I stood at that time.

Q. What is the situation about there being a change in your mental attitude, or relative to service in these civilian camps, the one to which you were assigned, do you still have the same convictions about that? (R. 123)

A. I think I should explain here that for at least the first two years that I was in Washington, D. C. I intended, fully intended to go to a civilian public service camp and participate in the program. As to whether in the future I might refuse to perform work of national importance, I'd say would depend entirely on the situation then, but it would be extremely difficult for me, in view of the prison sentence I served, to refuse. I think I should also state that the camp system, then in operation, was abandoned by Selective Service during the Korean War, that the type of work has changed, that the conditions imposed by the government have been altered to a very considerable degree and I think this is speculative, because until a man faces the question, it is impossible to answer, except to guess. I think, however, that if during the Korean War I had been classified as a conscientious objector and ordered to work of national importance, under the program then in existence, that I would have gone.

Q. You are saying that the program has since changed so that while you did not, perhaps, approve it, you did not find it so objectionable that you would have refused to go?

A. That is correct.

Q. So that whether you would presently, if you were confronted with the problem, refuse to go would depend upon the kind of an institution to be, you would be directed to go?

A. No, sir, no, that isn't true. My objection was not limited to the particular kind of an institution. (R. 124)

My objection was toward the whole set of circumstances where the law of congress was being altered and changed by Selective Service, it wasn't administered, we feel, as congress felt it should be administered. But, I didn't object to any particular kind of work, or any particular assignment I might get.

Q. Then it is a matter of—for want of a better term—modus operandi? A. No, sir.

Q. Then, you haven't made your position clear.

A. Well, let me say that both in the classification of conscientious objectors by the draft boards, by appeal boards, by the hearing officers whereby many hundreds of young men were denied classifications which they ought to have been given; where at the top of a hearing procedure you have a completely military board reviewing whether a man is a conscientious objector; where Selective Service established a system under which they degraded and punished conscientious objectors, you have a wholly different kind of problem presented to you than where conscientious objectors are recognized, where men are given an opportunity to contribute something of social value. But, it certainly does not limit itself to any modus operandi.

Q. Well, I don't want to engage in an argument with you. I am trying to find out—let me put it this way. Suppose—I will say it this way. The Circuit Court of

Appeals has, by the affirmance of the conviction, decided that these contentions which you made in support of your refusal are insufficient, or untenable. (R. 125)

Now then, if you were again faced with exactly the same problem, would your answer be the same?

A. I think this is quite unrealistic to assume this. If you want me to assume it as an hypothesis—

Q. Yes.

A. I think, sir, I have answered the question in saying I think I did the right thing under those circumstances at that time.

Q. And I take it from that that if you were again confronted with the same circumstances, your action would be the same?

A. Sir, it is impossible, I believe, for the circumstances to repeat themselves. There have been very great changes in the recognition of conscientious objectors by the government.

Q. I am aware of the change.

A. I don't want to evade and I don't want to equivocate on this problem, but unless you gentlemen have served a term in prison and I'm sure none of you have, until you have been in prison I don't think you can meet the problem of deciding to go back to prison again. I must tell you that with two years in prison behind me, if I were faced with the question again, it would be a very difficult thing for me to go back to prison again. It took a good deal of courage for me to do it then and I think it would take more courage for me to do it again. Whether I have that kind of courage now, I don't know.

Q. Basically, your philosophy and thinking on the matter remain the same? (R. 126)

A. I certainly haven't changed my ideas on war, no I haven't.

Q. And your thinking with relation to this service in these camps is basically the same?

A. I think the camps were clearly a violation of the intent of Congress.

Q. But, the answer to my question is, yes, your philosophy and thinking and results are the same?

A. Sir, I can only say I think now, looking back at it with a sixteen year perspective, that I did the only thing I could have done at the time. (R. 127)

FINDINGS AND ORDER OF THE BOARD OF GOVERNORS (R. 140-143)

FINDINGS OF FACT AND ORDER DENYING APPLICATION

Robert Boland Brooks, having on or about October 27, 1958, pursuant to the provisions of the rules for the admission of attorneys to practice law in the State of Washington, made application in writing (Exhibit "A") for permission to take the bar examination, the same being supplemented with additional documents, hereto marked Exhibits "B" and "C," and the matter having come on before the Board of Governors of the Washington State Bar Association for action at its regular meeting on April 29, 1959, and the applicant appearing in person and by his attorney, Brockman Adams, and the Board having examined the said applicaiton, having orally examined the applicant, said examination having been reduced to writing and being attached hereto and marked Exhibit "D," and the Board having examined Exhibits "A," "B" and "C" and the opinions of the District Court of the United States for the Southern District of New York, 54 Fed. Supp. 995, and the Circuit Court of Appeals of the Second Circuit (147 F.(2d) 134), and noting that, a petition to the Supreme Court for certiorari was denied (65 S.Ct. 1027; 324 U.S. 878; 89 L.Ed. 1430), and the Board being fully advised in the premises makes the following

FINDINGS OF FACT

I

That if the applicant, Robert Boland Brooks, be found to be a man of good moral character, he has otherwise complied with (R. 140) all of the require-

ments necessary to entitle him to take the bar examination as a general applicant.

II

The Board finds that the applicant, Robert Boland Brooks,

A. Is not a man of good moral character,

B. That the applicant was on May 22, 1944, convicted of the crime of willful violation of the Selective Training and Service Act of 1940 (50 USC App., Sec. 311), which crime the Board finds to be a crime involving moral turpitude,

C. The facts upon which the Board finds Mr. Brooks is not a man of good moral character and that the crime of which he was convicted is a crime involving moral turpitude are:

1. On July 29, 1943, Mr. Brooks was by his draft board upon his own application, pursuant to the provisions of Section 305g of 50 USC App., classified IV-E, to-wit, as a conscientious objector opposed to both *combat* and *non-combat* military service.

2. After having been so classified, Mr. Brooks submitted to the required physical examination, was found physically fit and pursuant to the statute was by his draft board

> "in lieu of such induction, (b) assigned to work of national importance,"

and on October 18, 1953, was ordered to report for instruction and transportation to Civilian Public Service Camp No. 111 at Mancos, Colorado.

3. On October 13, 1943, Mr. Brooks in writing advised his draft board by letter (see Exhibit "C" herein) that he would not report as ordered, a copy of this letter being sent to the U. S. District Attorney of the Southern District of New York.

4. On November 18, 1943, Mr. Brooks was in the District Court for the Southern District of New York indicted for violation of the Selection Service Act in that he (R. 141)

> "unlawfully and knowingly did fail and neglect to report to said Selective Service Local Board No. 754 for said transportation and instructions for assignment for work of national importance; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Section 311, United States Code.)."

5. Mr. Brooks on March 16, 1944, through counsel, demurred to the indictment, the same was by written opinion overruled, and on April 17, 1944, a plea of not guilty was entered. On May 22, 1944, Mr. Brooks, having, pursuant to statute, waived a jury trial, was tried by the court, found guilty and sentenced to three years imprisonment.

On May 26, 1944, Mr. Brooks began serving the imposed sentence.

6. Appeal was regularly taken from the judgment and sentence of conviction to the Circuit Court of Appeals of the Second District, which on February 2, 1945, affirmed the judgment of the District Court, the opinion so doing being found in 147 F.(2d) 134.

7. In April, 1946, Mr. Brooks was released from prison having served approximately 22 months of his three year sentence.

8. Since his release from the penal institution, Mr. Brooks has not engaged in the practice of law any place.

9. That notwithstanding the fact Mr. Brooks assigns his religious tenets as the basis for his refusal to attend the Civilian Public Service Camp, the Board finds that

the true reasons therefor were the applicant's contentions:

(a) That the rules of the director of selective service establishing and governing the same were not within the contemplation and intent of Congress,

(b) That the regulations under which the camp was operated exceeded the powers delegated by the law. (R. 142)

(c) That the administration of the act under the rules as aforesaid amounted to conscription of civilian labor for purposes not in aid of the specified military powers,

(d) That the regulations under which the camp was conducted were in violation of the First and Fifth Amendments of the U. S. Constitution,

(e) That the law and the regulations established forced conscientious objectors into involuntary servitude in violation of the Thirteenth Amendment of the U. S. Constitution.

10. Mr. Brooks believes that if he were now to be confronted with a situation similar or identical to that which he encountered in 1943 he would now act as he then acted.

11. The acts of the applicant as herein detailed were unjustifiably defiant of the laws of the United States.

ORDER

It is, therefore, ordered that the application of Robert Boland Brooks to take the examination for admission to the bar of the State of Washington be and the same is hereby denied.

Dated this 26th day of June, 1959.

BOARD OF GOVERNORS
WASHINGTON STATE BAR ASSOCIATION

Attest: s/ By Thomas L. O'Leary President
s/ George H. Bovingdon Secretary (R. 143)

WASHINGTON STATE CONSTITUTION

"All able bodied male citizens of this state between the ages of eighteen and forty-five except such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty." Article X, Section 1. (Page 69, Vol. 1. Revised Code of Washington; page 461, Vol. 1, Remington Revised Statutes.)

OATH OF ATTORNEY

"I do solemnly swear: * * * I will support the constitution of the United States and the constitution of the state of Washington." (Rules for Admission, Rule 5, page 48, 34A Wn.2d, pocket part).

GROUNDS FOR REPRIMAND, SUSPENSION OR DISBARMENT

RULE 10.

"An attorney or counselor may be reprimanded, suspended or disbarred for any of the following causes: * * *

"(8) Disbarment by a foreign court of competent jurisdiction. (Page 183, of Vol. 34A Wn.2d).

PETITIONS FOR REHEARING

RULE 50

"Any party to an appealed case may, after an opinion has been filed, present to the court in the manner and time as hereinafter provided, a petition for rehearing. Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed." (Rules of the Supreme Court, No. 50, 34A Wn.2d pocket part page 20).

FILE COPY

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FEB 8 1961
JAMES R. BROWNING, Clerk

No. 594

In the Supreme Court of the United States

OCTOBER TERM 1960

IN THE MATTER OF THE APPLICATION OF ROBERT BOLAND BROOKS FOR ADMISSION TO PRACTICE LAW IN THE STATE OF WASHINGTON.

ROBERT BOLAND BROOKS, *Petitioner.*

THE BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, *Respondent.*

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Supreme Court of the United States

OCTOBER TERM, 1960

IN THE MATTER OF THE APPLIATION OF ROBERT BOLAND BROOKS FOR ADMISSION TO PRACTICE LAW IN THE STATE OF WASHINGTON, ROBERT BOLAND BROOKS, *Petitioner.* THE BOARD OF GOVERNORS OF THE WASHINGTON STATE BAR ASSOCIATION, *Respondent.*	No. 594

REPLY BRIEF OF PETITIONER

INTRODUCTION

Petitioner had hoped that his request for review by this Court could be disposed of on the basis of the Petition and the Brief in Opposition. However, in his efforts to block such review, counsel for Respondent has, we believe, made statements and advanced arguments which might mislead the Court on important points, thus necessitating the filing of this Reply.

As we endeavored to point out in the Petition, this case involves certain very sharply defined constitutional questions which are forthrightly raised by the action of the majority of the Court below. Instead of meeting the issues thus presented, counsel for Respondent seeks to

obscure matters by trying to create doubts—where none can exist—as to Petitioner's honesty, as to his ability to take the attorney's oath, as to his standing as a member of the Bar of New York, et cetera. His contentions are not supported by the facts in the record, and are all foreclosed here by virtue of the fact that they were presented below and decided adversely to his position. There are no such side issues as he tries to suggest. The Court below did not question Petitioner's character or other qualifications for admission on any grounds other than that (1) he was convicted for refusing to report to civilian public service camp, and (2) he still adheres to his religious objections to war. The Petition presents the issue whether such findings can constitutionally support the action of the majority below in excluding Petitioner from the bar. This Court must decide whether this is an issue meriting review—and should not permit itself to be led off into any of the bypaths suggested in Respondent's brief.

GENERAL STATEMENTS AS TO RESPONDENT'S POSITION

A. Petitioner is seeking review of the ruling of the Supreme Court of Washington, not of Respondent's findings and order.

Counsel for Respondent distorts the nature of this proceeding—Petitioner is seeking review of the action of the Supreme Court of Washington and not that previously taken by Respondent itself. In his entire brief all that counsel says with respect to the holding of the Court below is found at Page 4, Lines 2 to 7. His lengthy references to the findings of Respondent are

simply not relevant to the issues involved in this application for certiorari.

Contrary to counsel's theory of the case, the proceeding before the Washington State Supreme Court was an *original* one, and not a mere review of Respondent's findings and order. This is clearly demonstrated by:

(a) The form of the Court's order to Respondent (R. 166-67), which stated that it appeared that Petitioner was "entitled to have this Court take jurisdiction of his application and decide the same on its merits."

(b) The Court's acceptance of evidentiary material not presented to the Respondent (R. 170-183, 262-273, 400-423), as shown by its clerk's certification of these items as being part of its records and files.

(c) The language of the principal opinion below, which opens by saying "This is an application *in this court* for permission to take the bar examination" (Petition, App. A, p. 33, emphasis supplied), and then disposes of the matter by denying Petitioner's application (Petition, App. A, p. 36), rather than by affirming the action of Respondent, as counsel claims at pages 4 and 13 of his brief.

(d) The statutes and rules relied on by counsel for Respondent, which make it clear that the role of Respondent in matters of this kind is merely to make recommendations to the Supreme Court of Washington (Respondent's Brief, pp. 1A, 3A, 4A).

In other words, the procedure in handling admissions matters in Washington differs materially from that apparently followed in California and Illinois. The Court,

rather than Respondent, has acted finally in this matter, and it is the Court's ruling which we contend has deprived Petitioner of rights protected by the Constitution of the United States.

B. Respondent has apparently conceded our position on the issues raised in the Petition.

Counsel has not only failed to advance an argument in support of the opinions of the majority below, but has not set forth any answer to the principal arguments in our Petition, as found at Pages 12 to 31 thereof. He has not even cited the controlling case of *Schware v. Board of Bar Examiners* (1957) 353 U.S. 232, 1 L.Ed. (2d) 796, 77 S.Ct. 752, much less discussed its applicability here, and has sought to dispose of *Konigsberg v. State Bar of California* (1957) 353 U.S. 252, 1 L.Ed. (2d) 810, 77 S.Ct. 722, by distinguishing it factually, but without recognizing its general statement of the constitutional protections afforded applicants for admission to the bar.

Instead, he has argued that there were adequate non-federal grounds for the decision below and that Petitioner did not properly raise the federal questions he is asserting here. We believe that our discussion of these contentions below will demonstrate that neither of these positions is sound. That being the case, we submit that counsel's failure to discuss the grounds for issuance of the writ which are set forth in the Petition should be taken as a concession on his part that our position on these matters is valid and correct.

REPLY TO SPECIFIC ARGUMENTS IN RESPONDENT'S BRIEF

A. The Claim That No Federal Question Was Properly Raised Below (Brief, p. 2)

Counsel cites a number of cases at Page 2 of his brief which he claims announce rules demonstrating that Petitioner did not properly raise a federal question below. As we read these cases, they merely state that the federal rights claimed must be plainly and distinctly called to the attention of the state court before it disposes of the case (*Oxley Stave Co. v. Butler County* (1897) 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S. Ct. 709); that once claimed, such rights must be asserted through the various levels of the state proceedings (*Hulbert v. Chicago* (1906) 202 U.S. 275, 50 L. Ed. 1026, 26 S.Ct. 617); that the requirement of bringing a matter to the attention of the state court is not satisfied by presenting it in a petition for rehearing to the highest state court (*Live Oak Water Users Assoc. v. Railroad Commission* (1926) 269 U.S. 354, 357-8, 70 L.Ed. 305, 46 S.Ct. 149) or in briefs in the state proceedings which are *not* made a part of the record in this Court (*Lynch v. New York ex rel. Pierson* (1934) 293 U.S. 52, 54, 79 L.Ed. 191, 55 S.Ct. 16); that it must clearly appear that the rights thus claimed were passed on by the state court (*Bailey v. Anderson* (1945) 326 U.S. 203, 206-7, 90 L.Ed. 3, 66 S.Ct. 66); and that such rights cannot thereafter be raised on writ of error to this Court (*Osborne v. Clark* (1907) 204 U.S. 565, 567-8, 51 L.Ed. 619, 27 S.Ct. 319).

We think that the record clearly shows that Peti-

tioner has complied with all these requirements. He filed the usual application form prescribed by Respondent on October 27, 1958 (R. 4-17). On January 13, 1959, the Board, without having heard him or requested any further information, advised that his application had been denied (R. 18). This made it necessary, for the first time, to assert the federal rights which Petitioner feels protect him in his efforts to gain admission to the bar, and this was done in a memorandum brief furnished to Respondent at its next meeting (R. 21-27). These claims of protection under specific sections of the United States Constitution were repeated and amplified in the brief filed with the Court below (R. 222-232), and were pressed in oral argument. The fact that the relevant portions of the briefs are included in the record before this Court makes the *Lynch* case, *supra*, inapplicable. The arguments advanced in these briefs were not presented as incidental or subsidiary points, but were central to the entire presentation on Petitioner's behalf. Since this is a special proceeding without the standardized pleadings of ordinary civil litigation, we submit that these were appropriate ways in which to call the matter to the attention of the Washington court. Stern and Gressman, *Supreme Court Practice* (1954) pp. 90-91.

It is beyond question that both Respondent and the Washington Supreme Court were clearly apprised as to Petitioner's position in this regard. The concurring and dissenting opinions specifically commented on the federal questions raised (Petition, App. A, pp. 40, 43, 51), and since no adequate non-federal ground of deci-

sion is set forth in either of the majority opinions, the majority must necessarily have decided the federal questions adversely to Petitioner. See *McCullough v. Virginia* (1898) 172 U.S. 102, 117, 43 L.Ed. 382, 19 S. Ct. 134; *Lynch v. New York ex rel. Pierson, supra*, 293 U.S. at 54.

B. The Claim That Petitioner Has Not Exhausted His State Remedies (Brief, pp. 7-8)

The rule of the state court quoted by counsel at page 8 of his brief is clearly permissive. This matter was heard by the Court sitting *en banc*, and was fully and carefully presented to the Court, which deliberated on it for nearly a year. The Court divided 6 to 3, and three opinions were written which spell out the positions of the various justices in some detail. It did not appear to Petitioner that the Court had made any significant misstatement of the relevant facts or that he could cite additional authorities not already presented to the Court. Under these circumstances no useful purpose could have been served by seeking a rehearing. In view of the time already elapsed and the cost of further proceedings, it was decided to seek review by this Court as the only feasible means of redressing the action of the Court below.

Market Street R. Co. v. Railroad Commission (1945) 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770, does not support the contention for which counsel cites it. It simply holds that when a case is decided by a state court, the time to seek review in this Court begins to run, and that *if* a rehearing is sought, or granted of

the court's own motion, that defers finality for purposes of jurisdiction here. The decision also states, at page 551:

> "The judgment for our purpose is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment."

Cf. *Southern R. Co. v. Clift* (260 U.S. 316, 318-9, 67 L. Ed. 283, 43 S.Ct. 126). Since Petitioner did not exercise the option to seek a rehearing, and no action was taken by the Court to reopen the matter, the decision of September 29, 1960, was "the final word of a final court" in the language of the *Market Street* case, *supra*. Petitioner is therefore entitled to seek review by this Court at this time.

C. The Claims That There Are Adequate Non-Federal Grounds for the Decision Below.

We now turn to arguments of counsel which fall into a different category. These consist of a series of claims which, we submit, are not factually accurate. In any event, they are foreclosed by the decision below, and can have been urged here only to confuse the issue by attempting to create extraneous doubts as to Petitioner's character, in hope of prejudicing consideration of his appeal to this Court for relief.

The claims which fall into this category are as follows:

(1) The claim that Petitioner made a false statement to Respondent;

(2) The claim that Petitioner's draft offense was one involving moral turpitude;

(3) The claim that Petitioner violated his oath as an attorney and cannot take the oath required by Washington; and

(4) The claim that Petitioner is still subject to disbarment in New York.

We will discuss these in this order. By way of general preliminary comment, we wish to point out that the first is based on distortion of a finding made by Respondent but rejected by the Court below; the second is based on a finding by Respondent which was unsupported by explanation or authority and was rejected by the Court below; and the third and fourth are without foundation either in the findings of Respondent or in the opinions of the Court below, being strictly the product of counsel's imagination.

1. The claim that Petitioner made a false statement to Respondent (Brief, pp. 3, 4, 5, 9, 13, 16)

Throughout his brief, counsel contends that Petitioner "gave a false reason for his opposition to going to the work camp" (p. 3), that he "made a false statement in support of his application for admission" (p. 4), that he "falsely stated" his reason for refusing to go to camp (pp. 5, 9), and that Respondent "found that he did not tell the truth" (p. 13). He then argues that this constitutes an independent, non-federal ground for the ruling of the Court below, so that this Court should not review its order excluding Petitioner from the bar. We concede that if the Washington Court had

based its exclusion of Petitioner on a finding that he had lied with respect to a material matter, that would have precluded our seeking review by this Court if such finding were not a mere sham to cloak denial of federal rights. But that is clearly not the case:

"The complete answer to all this is that there is not a word in any of the opinions below to indicate that the Supreme Court of Washington, or any one of its members, found that Petitioner had made any such false statement or had been anything less than candid and truthful.

Beyond this, we submit that the finding of Respondent upon which counsel bases this argument was not a finding that Petitioner had been untruthful in any statement made to Respondent. All of counsel's characterizations listed above are based solely on a finding which reads as follows:

> "9. That notwithstanding the fact Mr. Brooks assigns his religious tenets as the basis for his refusal to attend the Civilian Public Service Camp, the Board finds that the true reasons therefor were the applicant's contentions: * * * " [There follows a listing of five legal arguments paraphrasing headings used in the brief filed on Petitioner's behalf in the Circuit Court of Appeals.] (R. 142-143)

Respondent did not identify any statement of Petitioner's claimed to be untrue—nor has counsel done so. We submit that if the able lawyers who comprise the Respondent had wished to express an opinion as to Petioner's honesty, they would have done so in clear and unmistakable language.[1] The record makes it clear that

although Petitioner had legal and constitutional objections to the camp system then in use, these were necessarily based on his fundamental religious convictions—and that only the latter could have led him to accept imprisonment. The key language in his testimony before Respondent appears in this colloquy with Mr. McBee, a member of the Board who interrogated him, at page 117 of the Record:

> "Q. All right. So the thing I want to be sure of was this, that you declined military service, both combatant and non-combatant because of your religious convictions and you declined this other matter [service in the civilian camp] because of constitutional and legal convictions?
>
> A. I would also have to say they were religious objections as well as constitutional objections. I don't think the legal objections excluded the religious objection to it.
>
> Q. *I did not mean to so imply* * * * " (Mr. McBee then turned to other matters) [Emphasis supplied]

This shows that Petitioner clearly advised Respondent he had had both religious and legal grounds for his actions in 1943—*and that the spokesman for Respondent conceded this.* At no time was Petitioner advised that Respondent had any doubt on this score or given an opportunity further to explain the religious basis for his conduct.

We discussed this matter at length in the briefs submitted to the Court below, pointing out that at most the finding represents a very dubious effort to reappraise Petitioner's motives some sixteen years later (R. 194-198, 378-392). If this matter is regarded as at all relevant, we also refer the Court to the evidence on this specific issue submitted to the Court below (R. 170-183) and to those portions of Petitioner's testimony relating to his reasons for not going to camp (R. 116-117, 121-125).

In any event, after this matter had been gone into at length in briefs and argument, the Court below refused to adopt the finding in question. The only finding made by Respondent which was adopted by the Washington Court was one that his actions in regard to his refusal to report to camp " * * * were unjustifiably defiant of the laws of the United States" (Petition, App. A, p. 35). That clearly relates to the federal questions raised in our Petition. Had the Court found merit in the finding relied on by counsel it would have adopted it in this same way. To the contrary, however, both the concurring and dissenting opinions expressly recognize that Petitioner's opposition to the work camps was based on religious grounds (Petition, App. A, pp. 38, 48). On the page last cited, the dissenting justices say, in response to this same argument of counsel's, that Petitioner was entitled to assert legal contentions in addition to his religious grounds and that this " * * * took nothing away from his stand as a conscientious objector." Counsel has no standing to urge this contention further.

2. The claim that Petitioner's draft offense was one involving moral turpitude (Brief, pp. 3, 14)

As we stated in our Petition, Respondent made a finding to this effect, but the Court below did not. We submit that this constitutes recognition by the latter that this position of Respondent's was unsound, leading to the Court's efforts to substitute the other standards for judging Petitioner's character which are discussed in our Petition. Like Respondent in its findings, counsel neither explains this bare conclusion nor

cites authorities to support it. In any event, he is precluded by the refusal of the Court below to adopt this as the basis for its action.

3. The claim that Petitioner violated his oath as an attorney and cannot take the oath required by Washington (Brief, pp. 5, 6, 7, 14)

Neither Respondent nor the Court below made any finding which remotely sustains this contention. There is not the slightest basis in the record for suggesting that New York, where Petitioner was practicing at the time of his conviction, construed its attorney's oath as requiring the alternative service which Petitioner refused. On the contrary, the record affirmatively shows that New York does not regard conviction for draft offenses similar to Petitioner's as disqualifying one for admission to the bar (Petition, pp. 20-22; R. 414a-418, 420-423). That being true, it is clear that New York does not regard such conduct as violative of the oath it requires of attorneys.

Counsel made his further argument that Petitioner cannot take Washington's attorney's oath in the Court below, and cited the same cases there which he now presents in its support (R. 318-320, 323a-326). The Washington court rejected his contention. We submit that counsel, in the face of this, cannot assert this matter as an alternative non-reviewable ground for the decision below.[2]

[2] It should be noted that this argument depends on two other claims advanced by counsel despite the fact that the Court below did not find the facts to be as he contends: namely, (1) that Petitioner has said that in the same circumstances he would again refuse to do work of national importance (Brief, pp. 5, 6, 9, 16; R. 310, 313-314; but see Petitioner's

4. The claim that Petitioner is still subject to disbarment in New York (Brief, pp. 5, 9, 12, 14, 15)

Respondent made no finding to this effect, and though counsel urged this contention upon the Court below (R. 314-315, 327, 340),[3] the latter did not adopt his view. The statement quoted at page 12 of Respondent's brief was made in Petitioner's application filed October 27, 1958 (R. 12) based on his recollection of the correspondence referred to.[4] Thereafter, the certificates of the Appellate Division of the Supreme Court of New York and of the Association of the Bar of the City of New York were received (R. 15-17). The former states that Petitioner is presently a member in good standing of the New York Bar, and the latter that the Association's Grievance Committee had noted Petitioner's conviction but had taken no action against him. As the record shows, Olin Harper LeCompte and Alban P. Mau, Jr., were admitted to the New York Bar after World War II despite convictions for offenses comparable to that of Petitioner, while Clyde W. Summers was admitted in 1942 despite his earlier rejection by Illinois and in the face of his statement to

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actual testimony, R. 123-127, and our analysis in the briefs below, R. 233-235, 394-395); and (2) that Petitioner has not repented and been rehabilitated (Brief, pp. 5, 9, 17; R. 314-315, 340; but see the actual testimony, R. 123-127, and the full statement from our brief which counsel quotes only in part, R. 249).

[3] We did not include these documents in the record because we regarded the issue as foreclosed by the decision below. However, we will be glad to have this and some related evidentiary material (including the letters from Petitioner's counsel at the time of his release from prison) certified for addition to the record if the Court so desires.

[4] See explanation of this at time of Petitioner's appearance before Respondent (R. 131-132) and in our reply brief below (R. 370-371).

the court that his conscience would compel him to violate the law in certain circumstances (R. 414a-418, 420-423). The "possibility" of disbarment in New York is a figment of counsel's imagination which the Court below refused to accept. It cannot serve as a non-federal ground to defeat Petitioner's application here.[3]

D. The Claims As to Petitioner's Letters of Recommendation (Brief, pp. 15-16)

Counsel says (Brief, p. 15) that Petitioner had evidently not told most of the writers of the letters of recommendation filed with Respondent the nature of the offense for which he was convicted. We can recall no support for this in the record. The writers do *not* say that Petitioner "was convicted of being a conscientious objector,"[4] since most of them knew that that is not a crime in and of itself. In most cases they do not give details as to Petitioner's offense, but simply indicate awareness that he had gone to prison for his conscientious objection to war and conscription. The suggestion as to what they "may very well believe" is sheer speculation, and there is no basis in *any* of the letters for the "explanation" advanced by counsel. Read in their entirety, as they should be, the letters clearly show that the writers know Petitioner well, that they know he was convicted of a draft offense, and that they have a high regard for him as a man of character.

[3] The only case cited by counsel on this point is *In re Greenberger* (1942) 38 N.Y.S.2d 758. This is dealt with in Footnote 5, page 21 of our Petition.

[4] Counsel advances this same concept—and mistates our Petition—at page 6 of his brief, where he also indulges in statements without foundation in the record, and in fact not true, to the effect that the men convicted during World War II were not true conscientious objectors.

Counsel next says that none of the letters came from people who knew Petitioner while he was practicing in New York and, in particular, that none came from his law associates there. This is true *literally*, but only because it relates back to the earlier reference to the forty-one letters filed with Respondent. However, the statement seems intended to imply that there is *no* information at all in the record from people who knew Petitioner's character and reputation during his legal career in New York. This is *not* true.

Respondent investigated Petitioner's background in New York through the National Conference of Bar Examiners. Four of the people contacted who had known Petitioner there, including one of his former partners, sent copies of their letters to the Conference to Petitioner. These were placed in the record when counsel made this claim below.[7] Thus the Washington Court was *not* without information on this point as counsel seems to suggest in renewing the argument here.

CONCLUSION

Since Respondent has not shown that there was any adequate non-federal ground for the decision below, or that Petitioner has not properly asserted his claim of federal rights, and since its counsel has not even ad-

[7] See discussion in our reply brief below (R. 365-367). These items were not included in the record brought here because they did not seem relevant to any issue which would properly be raised in this Court. However, as with the matters referred to in Footnote 2 above, we will be glad to have the letters certified for addition to the record if the Court so desires.

dressed himself to the legal issues which we feel are presented by the petition herein, we submit that the petition for certiorari should be granted.

Respectfully submitted,

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